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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1905

No. 3

STATE OF MISSOURI, CREDITOR, PETITIONER,

vs.

JOHN T. ROSS, TRUSTEE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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[fol. a] [Caption omitted]

[fol. 1] Citation in usual form, showing service on John T. Ross and others, omitted in printing.

[fol. 2]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF THE EASTERN DISTRICT OF MISSOURI

In Bankruptcy. No. 6862

In the Matter of the LAESSIG'S OIL PRODUCTS, INC., a Corporation, Bankrupt

CLAIM FOR PREFERENCE—Filed with Reference March 20, 1933

At Jefferson City, Missouri, on the 13th day of March, 1933, comes Richard R. Nacy of Jefferson City, in the County of Cole and State of Missouri and makes oath and says that he is the duly elected, qualified and acting Treasurer of the State of Missouri and duly authorized as such to make this proof and to collect and receive for and on behalf of the State of Missouri all taxes and interest hereinafter described, and further says that the Laessig's Oil Products, Inc., aforesaid is a corporation of the State of Missouri, against which a petition for adjudication in bankruptcy has been filed, and was at and before the filing of said petition and still is, justly and truly indebted to the State of Missouri in the sum of Eight Thousand Five Hundred and Eighty and Twenty-hundredths Dollars ($8,580.20), and that the consideration for said debt is as follows:

That at the times indicated in the account hereinafter itemized and set out, the said Laessig's Oil Products, Inc., received for sale and distribution and sold within this State motor vehicle fuels on which there was levied by the State of Missouri and due the said State and to this affiant as State Treasurer thereof, a license tax of Two Cents $0.02) [fol. 3] per gallon. And in addition to the amount of motor

vehicle fuel tax as above stated the State is also entitled to recover from the said bankrupt interest on the amount of said tax at the rate of Twelve per cent per annum upon said taxes from the dates said taxes were assessed until date the same are paid; that said taxes were assessed and interest began on the dates same were assessed by the State Inspector of Oils as hereinafter set out.

Said account for taxes and the items thereof and the times when the same were assessed and interest began being as follows, to-wit:

Month and year when sold		Amount tax	Date assessed	Interest to date of adjudication
Aug. 1932	Bal.	$1,239.44	10-4-32	$49.16
Aug. 1932		.....	.....	32.94*
Sept. 1932		2,784.14	11-2-32	83.52
Oct. 1932		1,550.72	12-2-32	31.02
Nov. 1932		1,868.18	1-5-32	16.18
Dec. 1932		924.90	2-1-33	....
Total		$8,366.38	.....	$212.82

Total principal and interest, $8,580.20.

Affiant further states that the whole amount of taxes and interest so due to the State of Missouri from said Company on the 1st day of February, 1933, the date of the adjudication of the bankruptcy of said Laessig's Oil Products, Inc., is Eight Thousand Five Hundred and Eighty and Twenty-hundredths Dollars ($8,580.20), together with interest on the amounts of said taxes ($8,366.38) at the rate of Twelve per cent per annum from the date of adjudication, February 1st, 1933, until date the same are paid.

Affiant further states that no part of said debt has been paid and that there are no set-offs or counterclaims to the same; that the State of Missouri has not nor has any person by its order or to the knowledge and belief of affiant for its use, had or received any manner of security for said debt whatever; that no note has been received for said claim, or any part thereof, nor any judgment rendered

* This item of interest is the interest that accrued on the part of the August tax which was paid before adjudication but not before this item of interest had accrued.

thereon or therefor, and that said State of Missouri is entitled to priority in the payment of said taxes and interest.

Richard R. Nacy, Treasurer of the State of Missouri.

[fol. 4] Subscribed and sworn to before me this 16th day of March, 1933. Marie S. Griffin, Notary Public within and for Cole County, Missouri. My commission as Notary Public will expire August 23, 1934. (Seal.)

ORDER OF REFEREE ALLOWING CLAIM OF STATE OF MISSOURI —June 9, 1933.

From Referee's Minutes—Volume 23, Page 390

June 9, 1933.

Hearing by consent on question of allowance of claim of Richard R. Nacy, Treasurer, State of Missouri, $8580.20, had and by consent of trustee, claim allowed state taxes preferred.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE DISTRICT OF MISSOURI

[Title omitted]

PROOF OF DEBT OF CITY OF ST. LOUIS, MISSOURI—Filed With Referee February 28, 1933

At St. Louis, in the State of Missouri, on the 9th day of of February, 1933, came Oliver G. Chapman, of said City and State and says:

1. That he hereinafter designates himself as claimant.

2. That he is the License Collector of the City of St. Louis, a corporation, duly organized, existing and doing business under and by virtue of the laws of the State of Missouri, and hereinafter designated as claimant.

That said claimant is doing business at the place, County and State aforesaid, and that affiant is duly authorized to make this proof, and that said bankrupt was, at and before the time the petition in bankruptcy was filed herein, and still is justly and truly indebted to the said claimant in the

[fol. 5] sum of Three thousand four hundred forty-two and 38/100 Dollars.

That the consideration of said debt is as follows:

Gasoline Tax License for quarter of year ending June 30, 1932, due July 16, 1932, and unpaid to date.

That no part of said debt has been paid, except — that there are no offsets or counter claims to the same except — and that this deponent has not, nor has any person for or on behalf of said claimant, or to this deponent's knowledge or belief, for said claimant's use, had or received any manner of security for said debt whatever, nor has any judgment been rendered therefor, or for any part thereof, nor has any note or other evidence of said debt been received, except as herein stated.

Oliver G. Chapman, License Collector of the City of St. Louis.

Subscribed and sworn to before me this 10th day of February, 1933. Fred L. Heinrichsmeyer, Notary Public. My commission expires October 24th, 1933. (Notarial Seal.)

(Filed With Proof of Debt)

Checks tendered in payment for license must be made payable to Oliver G. Chapman, License Collector.

Office of License Collector

Room 102 City Hall

District No. —.

St. Louis, Feb. 1st, 1933.

Laessig's Oil Products, Inc., 4839 Fyler Av.:

You are respectfully notified to call at this office at once and procure your Gasoline License, When Due July 16, 1932, for Quarter ending June 30, 1932.

Oliver G. Chapman, License Collector.

Amount $3442.38.

Return This Notice.

[fol. 6] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE EASTERN DISTRICT OF MISSOURI

[Title omitted]

PROOF OF DEBT OF CITY OF ST. LOUIS, MISSOURI—Filed With Referee February 28, 1933

At St. Louis, in the State of Missouri, on the 9th day of February, 1933, came Oliver G. Chapman, of said City and State and says

1. That he hereinafter designates himself as claimant.

2. That he is the License Collector of the City of St. Louis, a corporation, duly organized, existing and doing business under and by virtue of the laws of the State of Missouri, and hereinafter designated as claimant.

That said claimant is doing business at the place, County and State aforesaid, and that affiant is duly authorized to make this proof, and that said bankrupt was, at and before the time the petition in bankruptcy was filed herein, and still is justly and truly indebted to the said claimant in the sum of Three thousand two hundred and sixty and 27/100 Dollars.

That the consideration of said debt is as follows:

Gasoline Tax License for quarter of year ending Sept. 30, 1932, due on Oct. 16, 1932, and unpaid to date.

That no part of said debt has been paid, except — that there are no offsets or counter claims to the same except — and that this deponent has not, nor has any person for or on behalf of said claimant, or to this deponent's knowledge or belief, for said claimant's use, had or received any manner of security for said debt whatever, nor has any judgment been rendered therefor, or for any part thereof, nor has any note or other evidence of said debt been received, except as herein stated.

Oliver G. Chapman, License Collector of the City of St. Louis.

Subscribed and sworn to before me this 10th day of February, 1933. Fred L. Heinrichsmeyer, Notary Public. My commission expires October 24th, 1933. (Notarial Seal.)

[fol. 7] (Filed With Proof of Debt)

Checks tendered in payment for license must be made payable to Oliver G. Chapman, License Collector.

Office of License Collector

Room 102 City Hall

District No. —.

St. Louis, Feb. 1st, 1933.

Laessig's Oil Products Inc., 4839 Fyler Av.:

You are respectfully notified to call at this office at once and procure your Gasoline License, When Due October 16, 1932, for Quarter ending September 30, 1932.

Oliver G. Chapman, License Collector.

Amount $3260.27.

Return This Notice.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE EASTERN DISTRICT OF MISSOURI

[Title omitted]

PROOF OF DEBT OF CITY OF ST. LOUIS, MISSOURI—Filed With Referee February 28, 1933

At St. Louis, in the State of Missouri, on the 9th day of February, 1933, came Oliver G. Chapman, of said City and State and say

1. That he hereinafter designates himself as claimant.

2. That he is the License Collector of the City of St. Louis, a corporation, duly organized, existing and doing business under and by virtue of the laws of the State of Missouri, and hereinafter designated as claimant.

That said claimant is doing business at the place, County and State aforesaid, and that affiant is duly authorized to make this proof, and that said bankrupt was, at and before the time the petition in bankruptcy was filed herein, and still is justly and truly indebted to the said claimant in

[fol. 8] the sum of Two thousand three hundred twenty-three and 65/100 Dollars.

That the consideration of said debt is as follows:

Gasoline Tax License for quarter of Year ending Dec. 31, 1932, due on Jan. 16, 1933, and unpaid to date.

That no part of said debt has been paid, except — that there are no offsets or counter claims to the same except — and that this deponent has not, nor has any person for or on behalf of said claimant, or to this deponent's knowledge or belief, for said claimant's use, had or received any manner of security for said debt whatever, nor has any judgment been rendered therefor, or for any part thereof, nor has any note or other evidence of said debt been received, except as herein stated.

Oliver G. Chapman, License Collector of the City of St. Louis.

Subscribed and sworn to before me this 10th day of February, 1933. Fred L. Heinrichsmeyer, Notary Public. My commission expires October 24th, 1933. (Notarial Seal.)

(Filed With Proof of Debt)

Checks tendered in payment for license must be made payable to Oliver G. Chapman, License Collector.

Office of License Collector,

Room 102 City Hall

District No. —.

St. Louis, Feb. 1st, 1933.

Laessig's Oil Products Inc., 4839 Fyler Av.:

You are respectfully notified to call at this office at once and procure your Gasoline License, When Due January 16, 1933 for Quarter ending December 31, 1932.

Oliver G. Chapman, License Collector.

Amount $2323.65.

Return This Notice.

[fol. 9] ORDER OF REFEREE ALLOWING CLAIMS OF OLIVER G. CHAPMAN, COLLECTOR—June 9, 1933

From Referee's Minutes—Volume 23, Page 390

June 9, 1933.

Hearing by consent on question of allowance of claims of Oliver G. Chapman, Collector, $2323.65, $3260.27 and $3442.38, had and by consent of trustee claims allowed city taxes preferred.

IN UNITED STATES DISTRICT COURT

MOTION TO MODIFY ORDER OF REFEREE RESPECTING TAXES DUE STATE OF MISSOURI—Filed With Referee April 10, 1934

To John A. Hope, Esquire, Referee in Bankruptcy:

Comes now claimant, the State of Missouri, and respectfully represents that:

(1) On or about the 20th day of March, 1933, a claim for preference was filed by this claimant respecting an indebtedness due from the bankrupt herein in the sum of Eight Thousand Five Hundred Eighty Dollars and Twenty Cents ($8,580.20).

(2) That the nature of said demand was a claim for taxes due the State of Missouri upon gasoline sold by the Bankrupt herein; said tax accruing by virtue of the provisions of Article II Chapter 41 R. S. Missouri, 1929.

(3) That on the 9th day of June, 1933, your Honor made an order allowing the claim of the State of Missouri, in the sum of Eighty-Five Hundred and Eighty Dollars and Twenty Cents ($8,580.20), said claim being allowed as a preferred claim against the bankrupt estate for state taxes.

(4) That on the same date, to-wit, the 9th day of June, 1933, your Honor made an order allowing the claims of the City of St. Louis in the sums of Twenty-Three Hundred and Twenty-Three Dollars and Sixty-Five Cents ($2,323.65), Thirty-Two Hundred Sixty Dollars and Twenty-Seven Cents ($3,260.27) and Thirty-Four Hundred and

Forty-Two Dollars and ThitryEight Cents (3,442.38), as preferred claims against said estate for city gasoline taxes.

(5) That by virtue of 11 U. S. C. A. 104, all of these taxes are classed as preferred claims but the priority as between taxes is not established or attempted to be determined.

[fol. 10] (6) That by the provisions of Section 3152 R. S. of Missouri 1929, the taxes due the State of Missouri are entitled to preference over the taxes due the City of St. Louis, such statute not being in conflict with the Federal Bankruptcy Act.

Wherefore, the premises considered, claimant prays that the order herein made be modified allowing claimant's taxes herein referred to as a prior preference and that the trustee be directed to pay claimant's demand in full before disbursing any dividends to the City of St. Louis.

State of Missouri, Roy McKittrick, Attorney General. Harry G. Waltner, Jr., Assistant Attorney General. Joseph A. Lennon, Assistant Attorney General.

IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION TO MODIFY ORDER RESPECTING TAXES DUE THE STATE OF MISSOURI—Filed with Referee August 31, 1934

At St. Louis, in said Division of said District, this 31st day of August, 1934.

Now again comes the State of Missouri by Honorable Roy McKittrick, Attorney General, Honorable Harry G. Waltner, Jr., Assistant Attorney General and Honorable Joseph A. Lennon, Assistant Attorney General, and also comes the City of St. Louis by its attorneys, Honorable Charles M. Hay and Honorable John G. Burkhardt; and the motion of the State of Missouri filed herein on April 4, 1934, praying that the orders entered herein allowing the respective claims of the State and of the City against the bankrupt estate herein, for gasoline taxes, both dated June 9, 1933, be modified so as to give the said claim of the State priority over that of the City and so as to direct and require the trustee in Bankruptcy herein to pay said

claim of the State in full before paying any dividend on the claim of the City of St. Louis, is submitted to the undersigned Referee in Bankruptcy upon the proofs of said respective claims as heretofore filed herein, the said orders of June 9, 1933, allowing the same, and the other files and proceedings herein, and upon the briefs and arguments of counsel for the State and the City, respectively; and the referee having given the matter due consideration and be-
[fol. 11] ing fully advised in the premises, it is

Ordered that said motion of the State of Missouri be and hereby is overruled and denied, and that the same be and hereby is dismissed.

John A. Hope, Referee in Bankruptcy.

IN UNITED STATES DISTRICT COURT

PETITION FOR REVIEW OF REFEREE'S DECISION RESPECTING GASOLINE TAXES DUE THE STATE OF MISSOURI—Filed With Referee September 11, 1934

To Honorable John A. Hope, Esquire, Referee in Bankruptcy:

Now on this day comes claimant, the State of Missouri, and respectfully shows:

That your petitioner is a creditor of the above named bankrupt and has heretofore filed its claim against the above estate for gasoline taxes due the State of Missouri under the provisions of Article 2, Chapter 41, Revised Statutes of Missouri, 1929.

That the City of St. Louis is likewise a creditor of the above bankrupt and filed its claim against the above estate for gasoline taxes accruing to such municipality by virtue of the provisions of an Ordinance of said city regularly enacted and adopted.

That heretofore both said claims were allowed as preferred claims of equal priority against said estate.

That within the time required by law claimant herein filed its motion to modify the order of the Referee allowing said claims as preferred claims of equal priority, and prayed that the claim of the State of Missouri be allowed as a prior preference.

That on the 31st day of August, 1934, an order, a copy of which is hereto attached, was rendered and entered overruling and denying the said motion of the State of Missouri, the effect of which was to decree that the State of Missouri should not have priority over the City of St. Louis in respect to the payment of their respective claims for gasoline taxes.

That the order of August 31st, 1934, was and is erroneous in this:

[fol. 12]

I

That it is contrary to the law applicable to this case in that it ignores the principle that the sovereignty is entitled to the payment of its debts prior to the payment of debts of individuals or government agencies of lesser dignity.

II

That it is contrary to the law applicable to this case in that it ignores the provisions of the statutes of the State of Missouri, to-wit, Section 3152 R. S. Mo. 1929, which gives to the State of Missouri priority in case of insolvency for its debts and taxes over others having claims of like nature, which statutory provision is not contrary to or in conflict with the provisions of the Federal Bankruptcy Act.

Wherefore, the Court erred in denying Petitioner's motion to modify the decree and erred in failing to allow Petitioner's claim as a prior preference over the claim of the City of St. Louis in the distribution of the assets of the Bankrupt.

Therefore, your Petitioner feels aggrieved because of such orders and respectfully prays that the same be reviewed.

State of Missouri, Petitioner, Roy. McKittrick, Attorney-General; H. Geo. Waltner, Jr., Assistant Attorney-General; J. A. Lennon, Assistant Attorney-General, for Petitioner.

IN UNITED STATES DISTRICT COURT

CERTIFICATE OF THE REFEREE ON PETITION OF THE STATE OF MISSOURI FOR REVIEW OF THE ORDER OF THE REFEREE DENYING PETITIONER'S MOTION TO DIRECT THE TRUSTEE TO PAY THE STATE'S CLAIM FOR GASOLINE TAXES IN FULL BEFORE MAKING ANY PAYMENT TO THE CITY OF ST. LOUIS—Filed September 21, 1934

I, John A. Hope, One of the Referees in Bankruptcy of this Court, do hereby certify that on the 1st day of February, 1933, Laessig's Oil Products, Inc., a corporation, was adjudicated a bankrupt by this Court, and thereupon [fol. 13] the case was referred generally to Honorable Walter D. Coles, then one of the Referees in Bankruptcy of this Court for administration. Said Coles resigned as such Referee, effective February 1st, 1934, on which date the Court accepted his resignation and appointed me as his successor, and directed that all cases theretofore referred to said Coles as such Referee be referred to me as his successor.

I further certify that in the course of the proceedings in the above entitled cause before me, the following question arose pertinent to the said proceedings:

Motion of the State of Missouri to Modify Order of Referee Respecting Taxes Due the State

On April 10, 1934, the State of Missouri, by its Attorney-General, filed with me a motion asserting that the claim of the State for gasoline taxes in the sum of $8580.20, allowed by the Referee on June 9, 1933, "as a preferred claim for state taxes," should be given priority over certain claims which the Referee had allowed "as preferred claims for (St. Louis) City gasoline taxes." The motion asked that the order allowing the claim of the State be modified so as to give it the priority mentioned, and "that the trustee be directed to pay claimant's demand in full before disbursing any dividends to the City of St. Louis." As ground for the priority thus claimed, the motion avers "that by the provisions of Section 3152, R. S. Mo. 1929, the taxes due the State of Missouri are entitled to preference over the taxes due the City of St. Louis, such statute not being in conflict with the Federal Bankruptcy Act."

Motion Heard

On August 31, 1934, I heard the above motion and took it as submitted upon—

(a) Three separate proofs of claim for the City taxes, each in the prescribed bankruptcy form, signed and sworn to by Oliver G. Chapman, License Collector of the City of St. Louis, and filed with Referee Coles on February 28, 1933, showing that the bankrupt "was at and before the time the petition in bankruptcy was filed herein, and still is, justly and truly indebted to the said claimant for "gasoline tax license" in the sum of $3442.38 "for quarter year ending June 30, 1932", $3260.27 "for quarter year ending September 30, 1932," and $2323.65 "for quarter year ending December 31, 1932."

(b) The order of Referee Coles dated June 9, 1933, allowing these claims, after due hearing, and by consent of the trustee, for the amounts mentioned as "city taxes preferred."

[fol. 14] (c) Proof of the claim of the State of $8580.20, consisting of $8367.38 as license tax on motor vehicle fuels sold by the bankrupt from August to December, inclusive, 1932, and interest thereon to date of the adjudication in bankruptcy. This proof is in the prescribed bankruptcy form, with the added allegation "that said State of Missouri is entitled to priority in the payment of said taxes and interest." It is signed and sworn to by the State Treasurer, Richard R. Nacy.

(d) The order of Referee Coles, dated June 9, 1933, allowing the above claim as "state taxes preferred."

(e) Other files and proceedings in the case disclose that the assets of the bankrupt estate have been liquidated and converted into money; that the trustee has paid certain approved and allowed costs and expenses of administration, and preferred wage claims, and has a balance in his hands of $11,867.18; that in addition to the above allowed tax claim of the State, $8580.20, and the allowed tax claims of the City of St. Louis $9026.30 tax claim of the City of Maplewood for $3.98, and tax claim of the City of University City for $44.93, have been allowed; so that the total of the allowed claims for taxes is $17,655.41, being $5798.23

in excess of the total amount of the bankrupt estate left for distribution. Some costs of administration are still to be paid out of the above balance.

Motion Denied. Petition for Review

After due consideration of said motion and of the pertinent facts, as disclosed by the files and record above mentioned, I made and entered an order on August 31, 1934, denying a motion and dismissing it. On the next day, September 1, 1934, the State filed its petition for a review of this order by the Judge, upon the following grounds:

I

That it is contrary to the law applicable to this case in that it ignores the principle that the sovereignty is entitled to the payment of its debts prior to the payment of debts of individuals or government agencies of lesser dignity.

II

That it is contrary to the law applicable to this case in that it ignores the provisions of the statutes of the State of Missouri, to-wit, Section 3152 R. S. Mo. 1929, which gives to the State of Missouri priority in case of insolvency for its debts and taxes over others having claims of like nature, [fol. 15] which statutory provision is not contrary to or in conflict with the provisions of the Federal Bankruptcy Act."

Opinion of the Referee

Since the order is to be reviewed, it may not be improper, I think, for me to explain that I made the order upon the authority of Section 64 of the Bankruptcy Act and the decisions of the Federal Courts interpreting its provisions, as I understand them.

C City of Dallas vs. Sophie Ryan, et al., 22 A. B. R. (N. S.) 378;
Re A. J. Waterman Mfg. Co., 291 Fed. 589, l. c. 594;
Re Wyley Company, 292 Fed. 900 l. c. 902;
Re A. E. Fountain, Inc., 295 Fed. 873;
Guaranty Title & Trust Co. vs. Title Guaranty & Surety Company, 224 U. S. 152, 56 L. Ed. 706;
Re Rouse, Hazard & Company, 91 Fed. 96;
Re Slomka, 122 Fed. 630;
Re Consumers Coffee Co., 18 A. B. R. 500 l. c. 502.

Section 64, says the Circuit Court of Appeals, Fifth Circuit, in Dallas vs. Ryan, supra, "gives the rule for paying out the money arising from the bankrupt's property which remains for general distribution after all special liens and encumbrances have been dealt with." Valid liens on the bankrupt's property are to be first satisfied (Sec. 67d); next the priority claims mentioned in Section 64 are to be paid; and then any balance remaining is to be distributed as dividends to general creditors. Section 64 as amended by the Act of May 27, 1926, divides the priority items into seven classes, numbers them 1 to 7, and requires payment in the order in which they are thus numbered. "*All taxes* legally due and owing by the bankrupt to the *United States, State, County, District,* or *Municipality*" are put in class 6. See Sec. 64a and 64b (6). "Debts owing to any person (the United States and the several States being included in the term person as here used) who by the laws of the States or the United States are entitled to priority," are 7th and last in the order of payment.

The State of Missouri relies on Section 3152, Revised Statutes of Missouri, 1929, which provides that "whenever any person indebted to the State of Missouri is insolvent • • • the debts due the State of Missouri shall be first [fol. 16] satisfied, and the priority hereby established shall extend as well • • • to cases in which an act of bankruptcy is committed • • •." The learned Attorney-General and his assistants say that by reason of this section, 3152, and clause 7 of Section 64-b of the Bankruptcy Act, quoted above, the State's gasoline tax bill in this case should be paid in full prior to any payment on the allowed tax claims of the City of St. Louis.

It is doubtless true that the tax bill in question is a debt within the meaning of that term as used in Section 3152 of the Missouri Statutes (State ex rel vs. Trust Company, 209 Mo. 472, l. c. 491), and in the Bankruptcy Act. Kaw Boiler Works vs. Shull & Sanderson (C. C. A. 8th Cir.) 36 A. B. R. 531. But counsel overlook, it seems to me, that all taxes,—whether "United States, State, County, District, or Municipality",—are, by Section 64-b (6) definitely placed upon the same plane and in the same class, without distinction or priority, but ahead, of course, of the debts mentioned in clause 7 of this section.

In the matter of A. J. Waterman Manufacturing Company, supra, the Court, dealt with Section 64 as it stood

prior to the amendment of 1926, and said, among other things:

"Sub-section (a) of Section 64 of the Bankruptcy Act puts all taxes in one class, and in a class prior to all claims enumerated in section (b). I cannot sustain the contention of the United States that the United States has priority in the matter of taxes over the City of Portland, *and that section is distinct in putting all taxes upon an equality* * * *." 291 Fed. l. c. 594.

In the matter of Wyley, supra, the court, ruled on the question as to the priority of United States taxes over State taxes, and said:

"* * * Considering the dual nature of our government, and that neither the Union nor the States may destroy nor hinder the other in their several functions, and all having equal need of their revenues, it is concluded that the intent of Congress was that *there should be a pro-rata payment upon all the taxes named in Section 64 (a) when the available fund is not sufficient to pay in full*, the taxes due the United States having no priority over the others * * *." 292 Fed. l. c. 902.

In the matter of A. E. Fountain, Inc., supra, the Referee had ordered "that the taxes of the United States and the State of New York should be pro-rated and paid *pari passu.*" Reviewing the order of the Referee, in connection [fol. 17] with Section 64 as it then read (1924), Judge Hand, then District Judge for the Southern District of New York, observed.

"That taxes under the foregoing provisions of the Bankruptcy Act are not directed to be paid in any precise order though the United States is mentioned first. As the Act carefully provides in subd. (b), the order of payment of various items by placing them under separate numerals, it seems reasonable to contend that it would have done this in respect to taxes if Congress had intended any discrimination in priority between taxes due the United States and taxes due the states and political subdivisions thereof." 295 Fed. l. c. 874.

It may here be noted that Congress did, by the amendment of 1926, remove taxes from subdivision (a) down to

the sixth place in the order of priority, that the amendment made no other change in relation to taxes, that in thus assigning taxes to class six, United States taxes, state taxes, and municipal taxes were not placed "under separate numerals", but all alike were put under the one numeral 6. Hence, it is reasonable to conclude, as indicated by Judge Hand in the Fountain case, that Congress intended that there should be "no discrimination in priority" between the different kinds of taxes. "Of course", as the Court remarked in the Fountain case, "any tax which is a lien would necessarily precede any other claim whether by virtue of the taxing power or otherwise which was not a prior lien." But the taxes here in question are not liens on the property of the bankrupt. No provision in the Statute (Article 2, Chapter 41, Revised Statutes of Missouri, 1929) under which the so-called State gasoline taxes were assessed makes them a lien, either general or special, on any property of the taxpayer.

Section 3466 of the Revised Statutes of the United States gives priority to debts owing to the United States in substantially the same words as those used in the Missouri Statute (Section 3152 supra) to give the state priority for the collection of debts due the state. This section, 3466, having been cited in the Fountain case as entitling United States taxes to priority over State taxes, Judge Hand ruled

"Nor does Section 3466 in my opinion apply; that very section was invoked in the case of Guaranty Title & Trust Co. vs. Title Guaranty & Surety Co., 224 U. S. 152, 27 A. B. R. 873, 32 Sup. Ct. 457, 56 L. Ed. 706, and the Supreme Court held that it was superseded by the later Bankruptcy Act. The opinion said, 'The Act takes into consideration, we think the whole range of indebtedness of the Bankrupt, national, state and individual, and assigns the order of payment' " 295 Fed. l. c. 875.

[fol. 18] If, as held in the Waterman and Fountain cases, Section 3466, because superseded by the Bankruptcy Act (Sec. 64), gives United States taxes no priority in bankruptcy over State taxes, it is difficult to understand how Section 3152 of the Missouri Statutes can be said to give State taxes priority over city taxes, in the face of the fact that the Bankruptcy Act (Sec. 64) puts all taxes, City, State and United States alike, in one and the same class.

With reference to clause 7 of Section 64, it may be further said that the word "debt" in this clause, even conceding it to be broad enough to include taxes, must, so far as it attempts to bring state and city taxes down to clause 7, with priority for the state taxes, give way to the specific provision for taxes in clause 6, in accordance with the familiar rule of statutory construction that a specific provision on a particular subject controls over general language on the same subject.

"In other words", as aptly expressed in the matter of Lewis 99 Fed. 936, "although the laws of a State giving priority to certain debts are by Section 64-b cl. 5 (now 64-b cl. 7) introduced into the scheme of the present Bankruptcy Act, yet such State laws are so introduced only so far as the debts to which they give priority are not expressly dealt with as to priority in the Bankruptcy Act itself. Where both a State law and the Bankruptcy Act give priority to the same class of debts, the Bankruptcy Act not only controls the State law in the case of absolute conflict between the two, but by its express regulation of these priorities, excludes the State law altogether." See also Re: Honka, 122 Fed. 630 (C. C. A. N. Y.).

The Attorney-General cites in Re: Wright, 95 Fed. 807, in Re: Falls City Shirt Manufacturing Co., 98 Fed. 592, and Oliver vs. United States, 268 U. S. 1, 69 Law Ed. 817, as supporting his contention. I think he misconceives the meaning of these decisions. Rightly understood they seem to have no application. In the Wright case the bankrupt owed the County of Worcester, Massachusetts, a bill for the priority of the labor of its convicts. Under an insolvency law of that State such a bill was preferred, and the County asked that it be given priority under clause 5 (now cl. 7) of Section 64 of the Bankruptcy Act. Manifestly it did not come within any of the preceding clauses of that section since it was not cost of preserving the estate under clause 1, nor filing fees under clause 2, nor cost of administration under clause 3, nor wages under clause 4 (now cl. 5), nor taxes under paragraph (a). So District Judge Lowell assigned it to clause 5 (now cl. 7), and gave it priority over [fol. 19] general creditors by reason of the fact that this last clause incorporated therein the priority provision of the Massachusetts statute.

The Falls City case involved two claims which were liens on the bankrupt's property under Kentucky law. One was a landlord's lien and the other a material man's lien. Obviously these claims could not be assigned to any of the classes enumerated at 1 to 4 of Section 64, nor were they taxes specifically provided for in paragraph (a). So the United States District Court for the District of Kentucky, acting as a court in bankruptcy, put the claims of these lienholders in the last subdivision of Section 64 (cl. 5, now cl. 7), and accorded them priority to that extent over general creditors, by reason of the Kentucky lien statutes.

Nor is there anything in the decision of the Supreme Court of the United States in Oliver vs. United States, supra, that supports the claim of the State in this case. The question in the Oliver case was whether under Section 64, as it then read (1925), taxes or wages should be paid first. The taxes in the Oliver case were not secured by any lien on the property of the bankrupt. Of course, when there is a valid lien, such as the tax lien on real estate in Missouri, the lien is recognized and preserved in bankruptcy. The opinion in the Oliver case, as I understand it, simply held that taxes, unsecured by any lien, such as the gasoline taxes in the case at hand, were, by reason of paragraph (a) of Section 64, as it then stood, to be paid prior to the wage claims provided for in clause 4 (now cl. 5). Congress then, by the Amendment of May 27, 1926, moved "taxes payable under paragraph (a) hereof", namely, "*all* taxes legally due * * * the United States, state, county, district, or municipality", down to clause 6, just below wages in clause 5, since which time wages of the kind mentioned in clause 5 have been paid in full before taxes.

There is nothing in the Oliver case that justifies in the least, as I understand the decision, the contention that clause 7 (formerly cl. 5) of Section 64 modifies clause 6 so as to require state taxes to be paid ahead of other taxes. On the contrary, the word "dividend" in paragraph (a) of this section, and "as commonly used throughout the Bankruptcy Act, means", says the Supreme Court in the Oliver case, "partial payment to *general* creditors." It necessarily follows, it would seem, that the provision in Section 64-b that "the debts to have priority in advance of the pay-
[fol. 20] ment of *dividends to creditors* * * * shall be * * * (7) debts owing to any person (including the State) who by the laws of the States or the United States

is entitled to priority, means that the debts referred to in this clause 7 are to have priority over *general* creditors and not over any of the preferred claimants mentioned in the preceding clauses 1 to 6, inclusive, of Section 64.

There is some support for this view, I think, in the decision of the Circuit Court of Appeals, Second Circuit, in the matter of Ireland Dredging Corporation, etc., 61 Fed. (2d) 765. In this case, the creditor was an insurer of the bankrupt under the Workmen's Compensation Act of New York, and had a claim against the bankrupt for unpaid insurance premiums. An amendment to the Compensation Act, known as Section 130, gave the insurer priority, "subject to claims for wages". Near the end of the opinion, the Court said:

"We do not of course mean that a State statute may control the distribution of bankrupt estates. The priority arises under Section 64-b (7), which incorporates the state law pro tanto; and the hierarchy of claims—the order of their priority—is fixed by that section. Hence we ignore the provision of Section 130 that premiums shall be paid immediately after the claims for wages. *They take their place in the order prescribed by Section* 64-*b* (7), *regardless of where Section* 130 *puts them.*" 61 Fed. (2) l. c. 767.

For the reasons given, I concluded that the State and various city taxes are all upon an equality, that, since they cannot be paid in full, the available fund should be prorated among the several claims according to their respective amounts, and I, therefore, entered the order of August 31, 1934, denying the motion of the State for priority.

To which order the State, by its attorneys, duly excepted, and asked certification for review.

The said order is accordingly certified to the Judge for his opinion thereon.

I hand up herewith, for the information of the Judge:

1. The motion of the State, filed April 10, 1934, to modify the order of the Referee respecting taxes due the State.

2. The claims of the State filed March 30, 1933, for the taxes in question, amounting to $8580.20.

3. The order of the Referee, dated June 9, 1933, allowing the above claim of the State.

[fol. 21] 4. Three separate proofs of debt, for the city gasoline taxes mentioned in the said motion of the State, all signed and sworn to by the License Collector of the City of St. Louis, and filed February 28, 1933.

5. The order of the Referee allowing the said city taxes, dated June 9, 1933.

6. The order of the Referee, dated August 31, 1934, denying the said motion of the State.

7. The petition of the State, filed September 1, 1934, for review of the order last above mentioned.

John A. Hope, Referee in Bankruptcy.

St. Louis, Missouri, September 21st, 1934.

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING THE PETITION OF THE STATE OF MISSOURI FOR REVIEW OF THE ORDER OF THE REFEREE—Filed December 31, 1934

The petition of the State of Missouri for a review of the order of the Referee of August 31, 1934, denying petitioner's motion to direct the trustee to pay the State's claim for gasoline taxes in full before making any payment to the City of St. Louis having come on for hearing on November 30, 1934, was submitted to the Court; and now on this 31st day of December, 1934, after due consideration thereof the issues are found against petitioner.

It is therefore ordered that the aforesaid petition of the State of Missouri for review of the aforesaid order be and is hereby overruled and the said order of the referee is in all respects approved and confirmed.

Charles B. Davis, U. S. District Judge.

IN UNITED STATES DISTRICT COURT

PETITION OF STATE OF MISSOURI FOR APPEAL FILED IN U. S. DISTRICT COURT—Filed January 28, 1935

Now on this day comes the State of Missouri, Creditor, of the Laissig Oil Products, Inc., Bankrupt, and being ag-

grieved by the decree and order in this cause made and entered December 31, 1934, for the reasons set forth in the [fol. 22] Assignment of Errors filed herewith and herein prays that it be allowed an appeal from said decree and said order in this cause to the United States Circuit Court of Appeals for the Eighth Circuit, and that Citation be issued as provided by law and that a transcript of the record, pleadings, papers and proceedings upon which said decree and said order were based, duly authenticated, be filed with the United States Circuit Court of Appeals for the Eighth Circuit under the rule of such court in such cases made and provided.

Roy McKittrick, Attorney General; H. G. Waltner, Jr., J. A. Lennon, Assistant Attorneys General, for Petitioner.

In United States District Court

Assignment of Errors on Appeal Allowed by U. S. District Court—Filed January 28, 1935

Now on this day comes the State of Missouri, Appellant, and files this assignment of errors in the above entitled cause into and upon the order and decrees of the United States District Court for Eastern Division of the Eastern District of Missouri, in the above entitled cause, and further avers, alleges and states the fact to be that there is harmful and manifest error herein in the following particulars, to-wit:

I

That the Court erred in failing and refusing to grant appellant's motion to modify the order of Referee respecting taxes due the State of Missouri so as to allow appellant's claim for taxes as prior to the claim for taxes of the City of St. Louis.

II

The Court erred in neglecting, failing and refusing to order and direct the payment of appellant's taxes for gasoline as a prior preference, the same to be paid in full before any distribution is to be made to the City of St. Louis on its claim for gasoline taxes.

III

The Court erred in that the finding, judgment and decree of the court is against the law applicable to the case.

[fol. 23]

IV

The Court erred in failing to hold that the priorities as between the State of Missouri and City of St. Louis in the instant case are determined by Section 3152 R. S. Mo. 1929, and in failing to hold that such provision is consistent with and conformable to the Federal Bankruptcy Act.

V

The Court erred in failing to hold that Section 104, Title 11 U. S. C. A. does not establish parity of taxes or require allowance of all the taxes falling within such classification with an equal priority.

VI

The Court erred in failing to hold that the sovereign state of Missouri was entitled to payment of its taxes prior to the payment of the taxes of one of its [—] the City of St. Louis.

Wherefore, appellant prays the order and judgment of the Court reversing said judgment and decree.

Roy McKittrick, Attorney General; H. G. Waltner, Jr., Assistant Attorney General; J. A. Lennon, Assistant Attorney General, for appellant.

IN UNITED STATES DISTRICT COURT

ORDER OF U. S. DISTRICT COURT ALLOWING APPEAL—Filed January 28, 1935

This day came the appellant, by its solicitor, and presented to the Court its petition for the allowance of an appeal to the United States Circuit Court of Appeals for the Eighth Circuit, which petition, upon consideration by the Court, is hereby allowed and the Court allows an appeal to the United States Circuit Court of Appeals for the Eighth Circuit upon furnishing bond in the amount of

$250.00 Dollars to be approved by the Court within 10 days from the issuing of this order allowing appeal.

Dated this 28th day of January, 1935.

Charles B. Davis, Judge of United States District Court.

[fol. 24] IN UNITED STATES DISTRICT COURT

ELECTION AS TO PRINTING OF RECORD—Filed January 28, 1935

Comes now the State of Missouri, Appellant, and desires and elects that the record in this Appeal allowed by the United States District Court be printed under the supervision of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Roy McKittrick, Attorney General; H. G. Waltner, Jr., Assistant Attorney General; J. A. Lennon, Assistant Attorney General, for Appellant. John T. Ross, Trustee in Bankruptcy for Laessig's Oil Products, Inc. City of St. Louis, by Chas. M. Hay, John G. Burkhardt.

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT ON BEHALF OF APPELLANT, STATE OF MISSOURI—Filed January 28, 1935

To the Clerk of the United States District Court for the Eastern Division of the Eastern District of Missouri:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Eighth Circuit pursuant to the appeal allowed by the United States District Court in the above entitled cause, and to include in such transcript of record the following and no other papers or exhibits, to-wit:

(1) Original claim of the State of Missouri showing the filing thereof on March 30, 1933.

(2) Order of the Referee dated June 9, 1933, allowing such claim.

(3) Three separate proofs of debts of the City of St. Louis showing the filing thereof on February 28, 1933.

[fol. 25] (4) Order of the Referee dated June 9, 1933, allowing such claims.

(5) Motion to Modify Order of Referee, filed by State of Missouri, showing the filing thereof on April 10, 1934.

(6) Order of the Referee overruling the Motion to Modify Order of Referee filed by the State of Missouri dated August 31, 1934.

(7) Petition of State of Missouri for Review of Referee's Order overruling Motion to Modify, showing the filing thereof on September 1, 1934.

(8) Certificate of the Referee on Petition to the State of Missouri for review of the Order of the Referee Denying Petitioner's Motion to Direct the Trustee to Pay the State's Claim for Gasoline Taxes in Full Before Making any Payment to the City of St. Louis.

(9) Order of the District Court Overruling the Petition of the State of Missouri for Review of the Order of the Referee.

(10) Petition of State of Missouri for Appeal from Order of the District Court.

(11) Order allowing appeal of State of Missouri.

(12) Assignment of Errors by State of Missouri.

(13) Præcipe for Record.

(14) Proof of Service of Præcipe for record.

(15) Citation on Appeal.

(16) Proof of Service of Citation on Appeal.

(17) Election as to printing of Record.

Said transcript to be prepared as required by law and the rules of this Court and the rules of the United States Circuit Court of Appeals for the Eighth Circuit and to be filed in the office of the Clerk of the United States Circuit Court at St. Louis, Missouri, on or before the 9th day of March, 1935.

Dated this 28th day of January, 1935.

Roy McKittrick, Attorney General; H. G. Waltner, Jr., Assistant Attorney General; J. A. Lennon, Assistant Attorney General, for Appellant.

[fol. 26] Service of the above præcipe accepted and acknowledged this 28 day of January, 1935.

John T. Ross, Trustee Laissig's Oil Products, Inc.

Service of the above præcipe accepted and acknowledged this 28th day of January, 1935.

City of St. Louis, by Chas. M. Hay, John G. Burkhardt.

[fol. 27] Bond on appeal for $250, approved and filed February 5, 1935, omitted in printing.

IN UNITED STATES DISTRICT COURT

Narrative Statement of Proceedings—Filed March 8, 1935

Be It Remembered That in the above entitled cause the following proceedings were had in the above named court, being the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, and at the September term (1934) of said court.

On the 21st day of September, 1934, there was filed with the clerk of said court the certificate of the referee on petition of the State of Missouri for review of the order of the referee denying petitioner's motion to direct the trustee to pay the State's claim for gasoline taxes in full before making any payment to the City of St. Louis.

Said certificate being in words and figures as follows:

(Clerk will insert said certificate of the referee). The same is inserted elsewhere in the transcript herein.

Thereafter, on the 30th of November, 1934, the cause was submitted to the Court upon the certificate of the Referee.

Thereafter, on the 31st of December, 1934, the court, by order and decree duly filed and entered of record, overruled the motion of the State of Missouri for review and approved and affirmed the order of the referee in all respects.

To which ruling and order and decree of the Court overruling motion of Claimant (Appellant) then and there duly and legally objected and excepted and continues to object and except. Said order and decree overruling said motion is in words and figures as follows:

(The clerk will herein insert said order). The same is also inserted in the transcript herein.

Thereafter, on the 28th day of January, 1935, the Claimant (Appellant) duly filed with the Clerk of said Court its [fol. 28] petition for an appeal of said cause to the United States Circuit Court of Appeals, Eighth Circuit, from the court's order entered on the 31st day of December, 1934.

Said petition for appeal is in words and figures as follows:

(The Clerk will here insert such petition for appeal). The same is inserted elsewhere in the transcript herein.

And at the same time and with said Petition for Appeal of said cause Claimant (Appellant) filed its assignment of errors on such proposed appeal, which said assignment of errors is in words and figures as follows:

(The Clerk will here insert such transcript of errors). The same is inserted elsewhere in the transcript herein.

And said Petition for Appeal with said Assignment of Errors thereupon and on the 28 day of January, 1935, was duly presented to the court and thereupon and on said last named date, the Court, by order duly filed and entered, allowed said appeal as prayed upon Claimant (Appellant), giving bond in the sum of $250.00.

Said order allowing said appeal is in words and figures as follows:

(Clerk will here insert said order allowing said appeal). The same is inserted elsewhere in the transcript herein.

Thereafter and on the 28th day of January, 1935, there was issued and duly served upon the Attorneys (Counsel) for Appellees, Citation in said cause, which Citation together with Proof of Service thereof was, on the last named date, duly filed with the Clerk of said Court and entered of Record.

Said Citation, Proof of Service thereof and Order are in words and figures as follows:

(Clerk will here insert said Citation, Proof of Service thereof and Order, entering the same of record).

Thereafter and on the 5th day of February, 1935, the Claimant (Appellant) presented to the Court such bond on

appeal which then and there and on said last named date was approved by the Court and ordered filed on record which was accordingly done.

Said bond on appeal and said order approving and filing the same are in words and figures as follows:

[fol. 29] (Clerk will here insert said bond and said order). The same are inserted elsewhere in the transcript herein.

Thereafter and on the 28th day of January, 1935, Claimant's (Appellant's) Præcipe for Transcript bearing acknowledgment of service by counsel for Appellees was duly filed with the Clerk of said Court and ordered entered of Record.

Said Præcipe with acknowledgment of service thereof and said order are, in words and figures as follows:

(Clerk will here insert same). The same are inserted elsewhere in the transcript herein.

Thereafter and on the 28th day of January, 1935, there was duly filed with the Clerk of said Court Claimant's (Appellant's) election that the record be printed under the supervision of the Clerk of the Circuit Court of Appeals and ordered entered of record.

Said election and order are in words and figures as follows:

(Clerk will here insert same). The same are inserted elsewhere in the transcript herein.

The above were all the proceedings had in said Court in said cause.

(Approval of Narrative Statement of Proceedings by District Judge, etc.)

Therefore, the said State of Missouri, Appellant (Claimant) presents this, its Narrative Statement of Proceedings in said cause and prays the Court to allow, sign and seal the same so that the matters, rulings and exceptions may be made a part of the record herein which is accordingly done this 8th day of March, 1935.

Charles B. Davis, Judge of the District Court of the United States within and for the Eastern Division of the Eastern Judicial District of Missouri.

O. K. Chas. M. Hay, John G. Burkhardt, Attorneys for Appellees.

[fol. 30] Clerk's certificate to foregoing transcript omitted in printing.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

In Bankruptcy #6862

In re LAISSIGS OIL PRODUCTS, INC.

STATE OF MISSOURI, Creditor, Appellant,

vs.

JOHN T. ROSS, Trustee in Bankruptcy of Laissigs Oil Products Inc., and CITY OF ST. LOUIS, Creditor, Respondents

PETITION OF STATE OF MISSOURI FOR APPEAL—Filed January 29, 1935

[fol. 31] To the Honorable, the Judges of the Circuit Court of Appeals for the Eighth Circuit of the United States:

Your petitioner, State of Missouri, respectfully represents:

1. That petitioner is a creditor of Laissigs Oil Products, Inc., a Bankrupt, heretofore on February 1, 1933, adjudged bankrupt by the District Court of the United States for the Eastern Division of the Eastern District of Missouri.

2. That prior to such adjudication the bankrupt was duly incorporated and licensed by petitioner to engage in the business of dealing in and distributing motor vehicle fuels for use and sale and distribution for use on the highways of the State of Missouri.

3. That thereupon the Bankrupt became obligated to pay to the petitioner two cents per gallon upon all motor vehicle fuels received by it in this state, payment to be made by the 25th of the month following the month during which such motor vehicle fuels are received.

4. That after such adjudication your petitioner herein did on March 30, 1933, file with the designated referee its claim for preference in the sum of $8,580.20, the same constituting motor vehicle fuel taxes and interest to date of adjudication.

5. That thereafter on June 9, 1933, the referee entered his order allowing claim of petitioner and the claims of the City of St. Louis for gasoline taxes, the proof of debt for which had been theretofore filed, such claims being allowed by the referee as preferred claims of equal rank.

6. That thereafter on April 10, 1934, petitioner filed a motion to modify the order of the referee so as to give petitioner's claim a priority over the claim of the City of St. Louis for gasoline taxes.

7. That thereafter on August 31, 1934, the referee entered an order denying petitioner's motion and dismissing it.

8. That on September 1, 1934, petitioner filed petition for review of such order of the referee by the District Court for the Eastern Division of the Eastern District of Missouri.

9. That thereafter on the 31st day of December, 1934, an order was granted and entered by the said District Court of the United States overruling the petition of the State of Missouri for review and in all respects approving and confirming the order of the referee. A copy of said order of said District Court is hereto attached.

[fol. 32] 10. That the order of December 31, 1934, is erroneous in that as a matter of law the State of Missouri is entitled to priority over the City of St. Louis in distribution of the assets of the bankrupt estate for the following reasons:—

(a) Under the provisions of 11 U. S. C. A. 104, the taxes of the State of Missouri and of the City of St. Louis are classified as preferred claims. This section provides in part as follows:

"The Court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district or municipality, in the order of priority as set forth in paragraph B hereof * * *

(b) to have priority in advance of the payments of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be * * * (6) taxes payable under paragraph (a) hereof * * *"

The foregoing provision does not determine the priority as between state and municipal taxes, nor does it require that such taxes be allowed and paid on a parity. Although the Courts have held taxes of the United States and of the State are on a parity, (because each sovereign must be recognized) the courts have not so held in respect to tax claims of a state and one of its municipalities.

(b) Under the established doctrine of sovereignty of the State, applying to debts due the sovereignty, taxes due the State must be paid before taxes due the City of St. Louis. Under this principle the sovereign state is enti-led to payment of its debt prior to the payment of debts of governmental agencies of lesser dignity. This sovereign right has never been relinquished or waived by the State of Missouri.

(c) Under the provisions of Section 3152 R. S. Mo. 1929, reading as follows:

"Whenever any person indebted to the state of Missouri is insolvent, or whenever the estate of any deceased debtor in the hands of the executors or administrators is insufficient to pay all the debts due from the deceased, the debts due to the State of Missouri shall be first satisfied, and the priority hereby established shall extend as well to cases in which a debtor not having sufficient property to pay all his debts makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed: Provided, that nothing in this article contained shall be construed to interfere with [fol. 33] the priority of the United States as secured by law, or the payment of the expenses of the last sickness, wages of servants, demands for medicine and medical attendance during the last sickness of the deceased, nor funeral expenses."

the State of Missouri is entitled to priority in payment of its debts over municipal corporations. The term debt used in this Section has be-n construed by the Supreme Court of

Missouri to include taxes. As this statutory provision is not contrary to or in conflict with the theory or provisions of the Federal Bankruptcy Act, it should be recognized by the Bankruptcy Court in the distribution of the assets of the estate.

Wherefore, your petitioner feeling aggrieved because of such order entered on December 31, 1934, in the above entitled proceeding, does hereby petition for an appeal from the said order to the United States Circuit Court of Appeals for the Eighth Circuit, and prays that its appeal may be allowed and that a citation may be granted and directed to John T. Ross, Trustee of the above named bankrupt estate and to the City of St. Louis, adversely interested, commanding them to appear before the United States Circuit Court of Appeals for the Eighth Circuit to do and receive that which may appertain to justice to be done in the premises, and that a transcript of the record and evidence in said proceeding, duly authenticated may be transmitted to the said United States Circuit Court of Appeals for the Eighth Circuit.

Roy McKittrick, Attorney General; H. G. Waltner, Jr., J. A. Lennon, Assistant Attorneys General, for Appellant.

STATE OF MISSOURI,
County of Cole, ss:

Now on this 22nd day of January, 1935, comes Harry G. Waltner, Jr., being first duly sworn upon his oath states that he is a duly appointed, qualified and acting Assistant Attorney General of the State of Missouri, and as such makes this affidavit.

That the matters and things contained in the foregoing petition of the State of Missouri for appeal are true and correct according to the best of his knowledge, information and belief.

[fol. 34] That this appeal is not intended for vexation or delay but that he verily believes that injustice has been done.

That attached to this petition is a true and correct copy of the order in the above entitled cause made by Honorable B. Davis, Judge of the United States District Court of the

Eastern Division of the Eastern District of Missouri, made, filed and entered on the 31st day of December, 1934.

H. G. Waltner, Jr., Assistant Attorney General.

Subscribed and sworn to before me this 2nd day of January, 1935. J. L. Ritzenthaler, Notary Public. My Commission expires January 21, 1937. (Notarial Seal.)

Order Overruling the Petition of the State of Missouri for Review of the Order of the Referee

UNITED STATES OF AMERICA,
Eastern Division of the Eastern
Judicial District of Missouri, ss:

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR SAID DIVISION OF SAID DISTRICT

In Bankruptcy. No. 6862

In the Matter of LAESSIG'S OIL PRODUCTS, INC., Bankrupt

The petition of the State of Missouri for a review of the order of the Referee of August 31, 1934, denying petitioner's motion to direct the trustee to pay the State's claim for gasoline taxes in full before making any payment to the City of St. Louis having come on for hearing on November 30, 1934, was submitted to the Court; and now on this 31st day of December, 1934, after due consideration thereof the issues are found against petitioner.

It is therefore ordered that the aforesaid petition of the State of Missouri for review of the aforesaid order be and is hereby overruled and the said order of the referee is in all respects approved and confirmed.

Charles B. Davis, U. S. District Judge.

[fol. 35] Endorsed: Filed, Dec. 31, 1934.

A copy. Attest: Jas. J. O'Connor. (Seal.)

[File endorsement omitted.]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed January 29, 1935

Now on this day comes the State of Missouri, Appellant, and files this assignment of errors in the above entitled cause into and upon the order and decrees of the United States District Court for Eastern Division of the Eastern District of Missouri, in the above entitled cause, and further avers, alleges and states the fact to be that there is harmful and manifest error herein in the following particulars, to-wit:

I.

That the Court erred in failing and refusing to grant appellant's motion to modify the order of Referee respecting taxes due the State of Missouri so as to allow appellant's claim for taxes as prior to the claim for taxes of the City of St. Louis.

II

The Court erred in neglecting, failing and refusing to order and direct the payment of appellant's taxes for gasoline as a prior preference, the same to be paid in full before any distribution is to be made to the City of St. Louis on its claim for gasoline taxes.

[fol. 36]

III

The Court erred in that the finding, judgment and decree of the court is against the law applicable to the case.

IV

The Court erred in failing to hold that the priorities as between the State of Missouri and City of St. Louis in the instant case are determined by Section 3152 R. S. Mo. 1929, and in failing to hold that such provision is consistent with and conformable to the Federal Bankruptcy Act.

V

The Court erred in failing to hold that Section 104, Title 11 U. S. C. A. does not establish parity of taxes or require

allowance of all the taxes falling within such classification with an equal priority.

VI

The Court erred in failing to hold that the sovereign state of Missouri was entitled to payment of its taxes prior to the payment of the taxes of one of its municipalities, the City of St. Louis.

Wherefore, appellant prays the order and judgment of the Court reversing said judgment and decree.

Roy McKittrick, Attorney General; H. G. Waltner, Jr., Assistant Attorney General; J. A. Lennon, Assistant Attorney General, for Appellant.

[File endorsement omitted.]

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

[fol. 37] STATE OF MISSOURI, Creditor, Appellant,

vs.

JOHN T. ROSS, Trustee in Bankruptcy of Laessig's Oil Products, Inc., and CITY OF ST. LOUIS, Creditor, Appellee

ORDER ALLOWING APPEAL, ETC.—January 29, 1935

The appeal sought by the State of Missouri in the above entitled cause is hereby allowed upon condition that a cost and damage bond in the sum of Two Hundred Fifty ($250.00) Dollars, to be approved by the Clerk of this Court, be filed on or before ten days from this date.

Citation, in usual form, showing service on John T. Ross and others, omitted in printing.

[fols. 38-44] Bond on appeal for $250, approved and filed February 5, 1935, omitted in printing.

[fol. 45] UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, NOVEMBER TERM, A. D. 1935

No. 10,239

STATE OF MISSOURI, Creditor, Appellant,

vs.

JOHN T. Ross, Trustee in Bankruptcy of Laessig's Oil Products, Inc., and CITY OF ST. LOUIS, Creditor, Appellees

Appeal from the District Court of the United States for the Eastern District of Missouri

NOVEMBER TERM, A. D. 1935

No. 10,281

STATE OF MISSOURI, Creditor, Appellant,

vs.

JOHN T. Ross, Trustee in Bankruptcy of Laessig's Oil Products, Inc., and CITY OF ST. LOUIS, Creditor, Appellees

Appeal from the District Court of the United States for the Eastern District of Missouri

OPINION—December 3, 1935

Mr. Harry G. Waltner, Jr., Assistant Attorney-General (Mr. Roy McKittrick, Attorney-General, was with him on the brief), for Appellant.

[fol. 46] Mr. John G. Burkhardt, Associate City Counselor (Mr. Charles M. Hay, City Counselor, was with him on the brief), for Appellees.

Before GARDNER, WOODROUGH and FARIS, Circuit Judges

GARDNER, Circuit Judge, delivered the opinion of the court.

This matter comes to us on appeal from an order of the lower court denying appellant's motion to direct the trustee in bankruptcy of the Laessig's Oil Products, Inc. to pay the claim of the State of Missouri for gasoline taxes in full before making any payment to the City of St. Louis for gasoline taxes.

Laessig's Oil Products, Inc. was, prior to bankruptcy, engaged in the business of distributing and selling motor vehicle fuels and other petroleum products in St. Louis, Missouri, and vicinity. Under the Missouri statute, motor vehicle fuel was subject to a sales tax calculated at the rate of two cents per gallon. During the months of August, September, October, November, and December, 1932, it failed to pay this tax, and during the same time it failed to pay a similar tax to the City of St. Louis, to which its products were subject under provisions of the city ordinance. On February 1, 1933, the Company was adjudged a bankrupt. On February 28, 1933, three separate proofs were filed on behalf of the City of St. Louis, claiming gasoline taxes in the aggregate amount of $8972.30 and interest; and on March 20, 1933, the State of Missouri filed its claim for gasoline taxes in the aggregate amount of $8366.38, with interest.

The State asserted a right of priority to the payment of its tax in full before making any payment to the City of St. Louis. The question of the right of priority becomes important because the value of the assets of the estate is materially less than the aggregate amount of these two claims. There is no dispute as to the amount due on these claims. The referee held that the claim of the State and of the City were all upon an equality, and since they could not be paid in full, the available funds should be prorated between the two claims according to their respective amounts. On petition for review of this order the court denied the same and approved and confirmed the order of the referee.

[fol. 47] Section 64 of the Bankruptcy Act (11 U. S. C. A. Sec. 104a) in so far as here pertinent, provides as follows:

"Debts which have priority. (a) The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality, in the order of priority as set forth in paragraph (b) hereof * * *.

"(b) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate

* * *; (2) the filing fees paid by creditors in involuntary cases, etc. * * *; (3) the cost of administration, etc. * * *; (4) where the confirmation of composition terms has been refused or set aside upon the objection and through the efforts and at the expense of one or more creditors, in the discretion of the court, the reasonable expenses of such creditors, etc. * * *; (5) wages due to workmen, etc. * * *; (6) taxes payable under paragraph (a) hereof, and (7) debts owing to any person who by the laws of the states or the United States is entitled to priority * * *."

Appellant admits that the Federal Bankruptcy Law supersedes all state priority provisions which are in conflict with it, but contends that it is the policy of the Bankruptcy Act to recognize and adopt so far as possible relevant state laws, so long as the uniformity of the Bankruptcy Act would not be disturbed. Appellant invokes the provisions of Section 3152, Revised Statutes of Missouri, 1929, as being relevant and not in conflict with the provisions of the Bankruptcy Act. The section referred to provides as follows:

"Whenever any person indebted to the State of Missouri is insolvent, * * * debts due to the State of Missouri shall be first satisfied and the priority hereby established shall extend as well to cases in which a debtor not having sufficient property to pay all of his debts makes a voluntary assignment thereof, * * * as to cases in which an act of bankruptcy is committed: Provided, that nothing in this article contained shall be construed to interfere with the priority to the United States as secured by law * * *."

Because of the provisions of this Act, appellant contends its claim should have been allowed as a preference over [fol. 48] the City's claim. The asserted right of priority is not predicated upon any lien that attached to the property. As said by us in City of Lincoln v. Ricketts, 77 Fed. (2d) 425:

"The asserted right of priority of payment is not a lien that attached to the property any more than the right of the United States to priority given it by Revised Statutes,

Sec. 3466 (31 U. S. C. A. Sec. 191), considered by the Supreme Court in Davis v. Pringle, supra, is such a lien, and the right of priority in payment of claims against a bankrupt estate, other than those based upon specific liens, must be found in the Bankruptcy Act."

The Bankruptcy Act deals specifically with the question of priority of claims, and by paragraph 6 of Section 64 (b) provision is made for the payment of all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality. It seems clear that the specific provision for the payment of taxes does not contemplate any right of priority as between the various taxing districts.

In New Jersey v. Anderson, 203 U. S. 483, the court, in reply to a contention that the Bankruptcy Act did not require the payment of taxes to a state wherein the bankrupt had no property and the state no means of collecting the tax upon the property within its jurisdiction, said:

"The requirement of the present law is a wide departure from the act of 1867, and specifically obliges the trustee to pay all taxes legally due and owing, *without distinction between the United States and the state, county, district, or municipality.*" (Italics supplied:)

See, also: Waco v. Bryan (C. C. A. 5) 127 Fed. 79; In re A. J. Waterman Mfg. Co. (D. C.) 291 Fed. 589; In re Wyley (D. C.) 292 Fed. 900; In re A. E. Fountain (D. C.) 295 Fed. 873.

It is, however, contended that the taxes due here amounted to debts, and, hence, under paragraph 7 of Sections 64 (b) the appellant was entitled to the benefit of the above quoted statute of Missouri. While taxes may be in the nature of debts within the meaning of the Bankruptcy Law, it is clear that they are specifically covered by paragraph 6. This seems so clear that rules of construction should not be resorted to, as it is only where a statute is [fol. 49] uncertain and on its face is susceptible of more than one construction that a court should resort to rules of construction. It seems too clear for argument that taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality, specifically men-

tioned in paragraph 6, are not included in the "debts" referred to in paragraph 7. If it could be said that there existed any repugnancy between these two provisions, then the provision which specifically characterizes the claim as one for taxes should prevail over the general provision contained in paragraph 7, referring to debts. The subject of taxes is fully and specifically covered by paragraph 6, and its provisions should be looked to alone, and there is no necessity to resort to the more general provision contained in paragraph 7.

The Circuit Court of Appeals of the Second Circuit, in In re Inland Dredging Corporation, 61 Fed. (2d) 765, considered the contention that a provision of the New York State Workmen's Compensation Act giving priority to certain debts should be given effect by the bankruptcy court. In disposing of this contention, the court said:

"We do not of course mean that a state statute may control the distribution of bankrupt estates. The priority arises under section 64b (7), which incorporates the state law pro tanto; and the hierarchy of claims—the order of their priority—is fixed by that section. Hence we ignore the provision of section 130 that premiums shall be paid immediately after claims for wages. They take their place in the order prescribed by section 64b (7), regardless of where section 130 puts them."

In Guarantee Title & Trust Company v. Title Guaranty & Surety Company, 224 U. S. 152, in speaking of the Bankruptcy Act, it is said that it "takes into consideration * * * the whole range of indebtedness of the bankrupt—national, state, and individual—and assigns the order of payment."

In Davis v. Pringle, 268 U. S. 315, the Federal agent contended that certain proved claims in bankruptcy proceedings were entitled to priority "on the ground that such claims arising during federal control of the railroads in 1918 are debts due to the United States and are preferred by Rev. Stats. Sec. 3466 and by the Bankruptcy Act of July 1, 1898 * * *." As the bankruptcy law then stood, debts [fol. 50] due the United States were not entitled to priority in payment, but it was contended that it was entitled to priority in payment under the provisions of Revised Statutes, Sec. 3466, above referred to. In denying this contention, the court, among other things, said: "It may be

assumed that the priority must be found if at all in the Bankruptcy Act and in its supposed incorporation of Rev. Stats. Sec. 3466," and the court held that "The priority claimed by the United States is not given to it by the law."

In City of Lincoln v. Ricketts, supra, we said:

"If, in the instant case, it be conceded that the city as a sovereign had the prerogative right of priority of payment of its claims, yet in so far as such claims are urged against a bankrupt estate, the priority will not be recognized unless within the provisions of the bankruptcy law which specifically provides for a priority."

We are of the view that resort can not be had to the Missouri statute for the purpose of determining the question of the right of priority, and that the Bankruptcy Act places all taxes, whether due the United States, state, county, district, or municipality, in one and the same class giving no priority to either over any other mentioned in the class.

The order appealed from is therefore
Affirmed.

[fol. 51] UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

[Title omitted]

DECREE—December 3, 1935

These causes came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and were argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court, that the order of the said District Court appealed from, in these causes, be, and the same is hereby, affirmed with costs; and that John T. Ross, Trustee in Bankruptcy of Laessig's Oil Products, Inc., and City of St. Louis, Creditor, have and recover against the State of Missouri, Creditor, the sum of Twenty [fol. 52] Dollars for their costs herein, to be collected in accordance with law.

December 3, 1935.

[fol. 53] UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION FOR REHEARING—Filed December 17, 1935

Now on this day comes the Petitioner, State of Missouri, Appellant in the above entitled causes, and within the time required by law, moves the Court to vacate and set aside the final judgment and decree heretofore entered on December 3, 1935, affirming the order of the District Court for [fol. 54] the Eastern District of Missouri in the above entitled causes, and to grant petitioner a rehearing in said causes because of material matters of the law and fact inadvertently overlooked by the Court in its opinion, in the respects herein pointed out.

(1) This Court in its opinion inadvertently failed to determine the issue raised under Point IV of Petitioner's brief. Although the state's claim is not clothed with a specific statutory lien yet there is an equitable or quasi lien attached to said claim which is allowable and should be recognized under Section 67 of the Bankruptcy Act, which Section preserves all existing liens on the property of the bankrupt. This point has apparently been overlooked by the Court in its decision, as on page four of the opinion it is stated "the asserted right of priority is not predicated upon any lien that attached to the property." Petitioner claimed and now claims a lien under Section 67 of the Bankruptcy Act. The opinion does not determine the rights of Petitioner under Section 67, which rights are superior to the rights of Appellee, City of St. Louis.

(2) The Court in its opinion has inadvertently overlooked the doctrine of sovereignty in its application to Section 64a and has construed such Section to have relinquished the right of sovereignty of the United States and that of the State of Missouri by mere construction, and that right, under well recognized rules of construction, cannot be denied or relinquished except through plain, unambiguous and certain language and can never be construed away.

(3) The Court in its opinion has inadvertently overlooked the decisions holding Section 3466, Revised Statutes United States to be in pari materia with the Bankruptcy

Act, and that accordingly Section 3152, Revised Statutes of Missouri must be so construed.

(4) That the decision in the instant case is in conflict with the decision of the United States Circuit Court of Appeals, Third Circuit, in the case of Commonwealth of Pennsylvania vs. Stocker, 70 Fed. (2d) 453, in which latter case the doctrine of sovereignty is recognized as being consistent with and to be applied in connection with gasoline tax claims in bankruptcy.

Wherefore, in view of the foregoing, the Petitioner respectfully prays this Court to grant a rehearing that right and justice may be done and a judgment rendered conformable to the facts and law in the instant case.

Roy McKittrick, Attorney-General; Harry G. Waltner, Jr., Assistant Attorney-General, for Petitioner State of Missouri.

[fol. 55] Certificate of Counsel

We, Roy McKittrick and Harry G. Waltner, Jr., hereby certify that we are counsel for Petitioner in the above entitled cause, that the facts set forth in the foregoing petition are true; that in our opinion said petition is well taken in point of law and is not interposed for vexation or delay, but is made in sincerity and good faith.

Roy McKittrick, Attorney-General; Harry G. Waltner, Jr., Assistant Attorney-General.

[File endorsement omitted.]

In United States Circuit Court of Appeals

Order Denying Petition for Rehearing—December 31, 1935

The petition for rehearing filed by counsel for appellant in these causes having been considered, It is now here ordered by this Court that the same, be, and it is hereby, denied.

December 31, 1935.

IN UNITED STATES CIRCUIT COURT OF APPEALS

MOTION FOR STAY OF MANDATE—Filed January 9, 1936

Comes now the Appellant above named, and respectfully moves this Honorable Court to stay the mandate in the above entitled action and not permit the same to be issued [fol. 56] out of said cause until further order of the Court on the ground and for the reason that Appellant expects and intends in good faith, within the time allowed by law, to apply to the Supreme Court of the United States of America by petition for a review on writ of certiorari the decision and judgment rendered in favor of Appellee and against Apellant in the above entitled actions.

Appellant further shows to the Court, if this Court so requires, that Appellant is ready, able and willing to make a good and sufficient bond, conditioned as provided by law, in said cause.

Wherefore, Appellant prays that the Court make and enter an appropriate order herein, staying the issuance of the mandate in the above entitled action until the further order of the Court, but not less than thirty days, and that the Court fix the amount of bond required of Appellant and that reasonable time be allowed in which to make, execute and file such bond.

Roy McKittrick, Attorney General; H. G. Waltner, Jr., Assi-tant Attorney General, for Appellant.

Service of motion omitted in printing.

[fol. 57] [File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING ISSUANCE OF MANDATE—January 14th, 1936

On Consideration of the motion of appellant for a stay of the mandate in these causes pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the

Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the cases by the Supreme Court.

January 14th, 1936.

[fol. 58] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 59] UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER FURTHER STAYING ISSUANCE OF MANDATE

On Consideration of the motion of appellant for a further stay of the mandate in these causes pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of 30 days from and after this date, and if within said period of 30 days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the cases by the Supreme Court.

February 12, 1936.

A true copy. Attest:

E. E. Koch, Clerk, U. S. Circuit Court of Appeals, Eighth Circuit. (Seal United States Circuit Court of Appeals, Eighth Circuit.)

[fol. 60] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 30, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is

granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsed on cover:] File No. 40,336. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 782. State of Missouri, Creditor, petitioner, vs. John T. Ross, Trustee, et al. Petition for a writ of certiorari and exhibit thereto. Filed March 2, 1936. Term No. 3, O. T., 1936.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. ———.

STATE OF MISSOURI, Creditor, *Petitioner,* vs. JOHN T. ROSS, Trustee, et al., *Respondents.*	*Circuit Court of Appeals, Eighth Circuit, Nos. 10239 & 10281.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ROY MCKITTRICK,
Attorney-General of Missouri;
HARRY G. WALTNER, JR.,
Assistant Attorney-General of Missouri;
GILBERT LAMB,
Of Counsel,
Attorneys for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. ——.

STATE OF MISSOURI, Creditor, *Petitioner,* vs. JOHN T. ROSS, Trustee in Bankruptcy of LAESSIG'S OIL PRODUCTS, Incorporated, and the City of St. Louis, Creditor, *Respondents.*	*Circuit Court of Appeals, Eighth Circuit, Nos. 10239 & 10281.*

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, the State of Missouri, respectfully shows as grounds for the issuance of a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

I.

Decree Below.

This writ is sought to review and revise the decree of the Circuit Court of Appeals for the Eighth Circuit which in effect requires the Respondent Trustee in Bankruptcy to pay the claim of the petitioner for gasoline taxes on an equality with that of the Respondent City of St. Louis,

rather than satisfying petitioner's claim in full before disbursing any funds of the bankrupt estate in payment of the claim of the Respondent city. The writ of certiorari hereby sought to be issued is to review the decree of the Circuit Court of Appeals for the Eighth Circuit entered in the cases of State of Missouri, Creditor, vs. John T. Ross, Trustee, No. 10239 and State of Missouri, Creditor, vs. John T. Ross, Trustee, etc., et al. No. 10281, on December 3, 1935 (R. 49), Motion for Rehearing was overruled on December 31, 1935 (R. 52), thus affirming the decree of the District Court of Missouri (R. 34). The two appeals were briefed and argued as one case, one transcript of record being supplied and one motion for rehearing being filed. One joint decree was entered.

II.

Questions Presented.

(1) Whether or not a tax claim due the Sovereign State of Missouri, which under the Law of Missouri accedes to the dignity of an equitable or quasi lien, is allowable as a lien against the property and assets of a bankrupt, such lien being preserved under Section 67(d) of the Bankruptcy Act (11 U. S. C. A. 107d).

(2) Whether or not the provisions of Section 64a and Section 64b(6) of the Bankruptcy Act are to be construed as the exclusive and sole provisions governing allowance of tax claims and if such affirmatively require the allowance of all taxes due the United States, State, county, district or municipality on an equal basis.

(3) Whether or not the provisions of Section 3152 R. S. Missouri 1929, may be construed as in pari materia with Sections 64a and 64b(6) of the Bankruptcy Act.

The substance of petitioner's claim is:

First, the sovereign right of the State of Missouri to receive payment of its debt in advance of payment to other creditors has been by State courts construed to be like an equitable or quasi lien, and that equitable liens are preserved by Section 67d of the Bankruptcy Act, (11 U. S. C. A.

104d), and should be paid in advance of other payments just as though a specific statutory lien had been declared by statute to exist upon the bankrupt's property;

Second, that if the first contention fails there is nothing in the provisions of the Bankruptcy Act and particularly Subdivision 64a and 64b(6) affirmatively requiring the allowance of all tax claims on an equal basis, or indicating a congressional intent to so provide, from which it follows that congress, having adopted the common law rule of the sovereignty being entitled to payment of its debt first by the enactment of Section 3466, R. S. U. S. (31 U. S. C. A. 191), cannot be construed as having relinquished that sovereign right of the United States or to have destroyed the corresponding sovereign right of Missouri by mere innuendo or construction as sovereign rights may only be reduced or relinquished by specific and certain legislation;

Third, that the provisions of Section 3152 R. S. Missouri 1929, which are merely declaratory of the common law existent in the State of Missouri, is in pari materia with Sections 64a and 64b(6) of the Bankruptcy Act; that a proper construction of such latter sections consistent with the general policy and purpose of the Bankruptcy Act requires that Section 3152 be considered in determining the relative priority between taxes designated in Section 64a;

III.

Statutes Involved.

The three statutes primarily involved in this cause are Section 67d of the Bankruptcy Act, (11 U. S. C. A. 107d) which reads in part as follows:

> "Liens given or accepted in good faith and not in contemplation of or in fraud upon the provisions of this title, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by anything herein."

Section 64 of the Bankruptcy Act, (11 U. S. C. A. 104), reads as follows:

"(a) The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality, in the order of priority as set forth in paragraph (b) hereof: Provided, that no order shall be made for the payment of a tax assessed against real estate of a bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court. Upon filing the receipts of the proper public officers for such payments the trustee shall be credited with the amounts thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

(b) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expense of such recovery; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorneys fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary and involuntary cases, as the court may allow; (4) where the confirmation of composition terms has been refused or set aside upon the objection and through the efforts and at the expense of one or more creditors, in the discretion of the court, the reasonable expenses of such creditors in opposing such composition; (5) wages due to workmen, clerks, traveling or city salesmen, or servants, which have been earned within three months before the date of the commence-

ment of the proceeding, not to exceed $600 to each claimant; (6) taxes payable under paragraph (a) hereof and (7) debts owing to any person who by the laws of the States or the United States is entitled to priority: Provided, that the term 'person' as used in this section shall include corporations, the United States and the several States and Territories of the United States."

And Section 3152 R. S. Missouri 1929, providing in part as follows:

> "Whenever any person indebted to the state of Missouri is insolvent, * * * the debts due to the State of Missouri shall be first satisfied, and the priority hereby established shall extend as well to cases in which a debtor not having sufficient property to pay all his debts makes a voluntary assignment thereof, * * * as to cases in which an act of bankruptcy is committed: Provided, that nothing in this article contained shall be construed to interfere with the priority of the United States as secured by law, * * * ."

IV.

Statement.

Your petitioner, together with the Respondent, City of St. Louis, became creditors of the Bankrupt, Laessig's Oil Products Company, of which Respondent John T. Ross became trustee, because of motor vehicle taxes due petitioner and Respondent City under Article II of Chapter 41 R. S. Missouri 1929, and pertinent provisions of the City Charter of the City of St. Louis respectively. In due time petitioner and respondent city filed claims which were allowed by the Referee under Section 64a of the Bankruptcy Act, 11 U. S. C. A. 104a, as preferred claims of equal dignity against the estate of the bankrupt (R. 4, 9). In due time the petitioner moved for modification of the order so as to permit and require petitioner's claim to be paid in full prior to any payment on the claim of respondent city (R. 9). This motion was denied (R. 10), and review sought to the United States District Court for the Eastern District of Missouri (R. 11). Judge Charles B. Davis, District Judge, approved

and confirmed the order of the Referee on December 31, 1934 (R. 21). In due time appeal was allowed by the United States Circuit Court of Appeals, being numbered 10239 (R. 36, 37), and by the United States District Court being numbered 10281 (R. 23). These appeals were consolidated and so treated by the United States Circuit Court of Appeals, Eighth Circuit. On December 3, 1935, the Circuit Court of Appeals entered its joint decree affirming the order of the District Court appealed from (R. 49). Within the time required, petition for rehearing (R. 50) was duly filed which was on December 31, 1935, overruled (R. 52). Thereafter stay of mandate was asked and granted pending application to this Honorable Court (R. 53).

V.

Rulings of the Court Below.

The Court of Appeals by its decision determined: First, (R. 46)

> "the asserted right of priority (of the state) is not predicated upon any lien that attached to the property,";

Second, (R. 47) that the provisions of Section 64a and Subdivision 6 of Section 64b of the Bankruptcy Act did

> "not contemplate any right of priority as between various taxing districts,";

Third, (R. 46) that the provisions of Section 3152, R. S. Missouri 1929, providing that in cases of insolvency the State's claims should be first satisfied except for the priority secured to the United States by law was not applicable because

> "the right of priority in payment of claims against a bankrupt estate * * * must be found in the Bankruptcy Act".

VI.

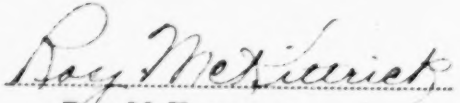
Reasons for Granting the Writ.

(a) The opinion in the instant case holds that petitioner's right of priority is not predicated upon any lien (R. 46). While it is true that no specific statutory lien can be claimed yet the petitioner did claim the quasi equitable lien preserved under Section 67d of the Bankruptcy Act. While the decisions are not entirely uniform as to the recognition of equitable liens in bankruptcy proceedings yet it is certain that the decision on this important question of general law is in conflict with the weight of authority and is probably in conflict with the decisions of this Honorable Court. This being a bankruptcy proceeding and the issue being the status of this claim under the Bankruptcy Act, it cannot be doubted but that it presents a federal question. It is the general rule and practice for federal bankruptcy courts to recognize liens of various kinds and especially equitable liens which come into existence by virtue of state law. In refusing to recognize the quasi equitable lien attached to petitioner's tax claim the Court has departed from the settled rule as established by this Court.

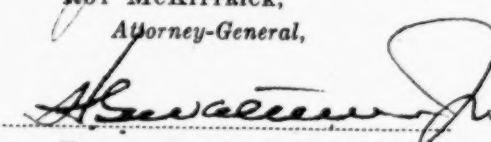
(b) The decision in the instant case insofar as it construes Section 64a of the Bankruptcy Act concerns an important question of federal law which has not been but should be settled by this court. The Court in its decision held that Section 64a did "not contemplate any right of priority as between various taxing districts" (R. 47). It is difficult for us to over-estimate the importance of this problem under present day conditions. With ever increasing Federal, State and local tax programs the conflict between the levying authorities is daily becoming more frequent. This court has never passed upon the proper construction of this section in any case in which the construction thereof was at issue. In the instant case the conflict is between the State and one of its municipalities, the Federal government's claim for priority not being involved as no federal taxes were delinquent. Nevertheless it is but a matter of time until some of the bankruptcy cases now pend-

ing in which this conflict arises will reach this Honorable Court. The court's construction of the section in the instant case will of course be determinative of the relative rights under Section 64a of the Bankruptcy Act of all taxing powers. The only decision of this Court in which the present issue has been touched upon is that of New Jersey vs. Anderson, 203 U. S. 483, 51 L. ed. 284, the pertinent statement in which petitioner earnestly asserts cannot be considered as more than obiter dictum. Because of some lower court decisions which tend to obscure rather than clarify a proper conception of this law and the assertions in the case of New Jersey vs. Anderson supra, this court should clarify the law on this question.

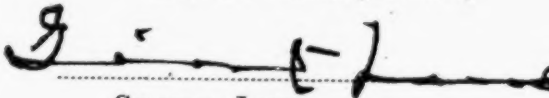
The court in its decision has applied cases holding "the right of priority in payment of claims against a bankrupt estate * * * must be found in the bankruptcy act," (R. 46), to a construction of Section 64a in the case erroneously. The cases in which this statement is found have been cases in which a priority was claimed, provision for which could not be found at any place in any provision of the bankruptcy act. By applying such rules to situations as existing in the instant case the instant decision has tended to further obscure the correct construction of Section 64 of the Bankruptcy Act.



ROY MCKITTRICK,
Attorney-General,



HARRY G. WALTNER, JR.,
Assistant Attorney-General,



GILBERT LAMB,
Of Counsel,

Counsel for Petitioner.

State of Missouri,
County of Cole. } *ss.*

Gilbert Lamb being duly sworn upon oath states that he is agent and attorney for the petitioner named in the foregoing petition, and makes this affidavit for and on behalf of said petitioner; that he has read the same and knows the contents thereof and that the facts therein stated are true to the best of his knowledge, information and belief.

Subscribed and sworn to before me a notary public for Cole County, Missouri, this 19th day of February, 1936.

Notary Public

My commission expires ~~January 21, 1937.~~

AUG 5 - 1937

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions.

An opinion was rendered by the Referee in Bankruptcy hearing petitioner's claim. It was written by Honorable John A. Hope and filed September 21, 1934. It appears on page 15 of the record. Upon review in the District Court Honorable Chas. B. Davis, District Judge, entered an order approving and confirming the order of the referee in all respects. This order is found at page 21 of the record. The opinion of the United States Circuit Court of Appeals (Judges Gardner, Woodrough and Farris), Judge Gardner writing, was filed on December 3, 1935, as appears on page 44 of the record. None of the opinions or orders have been reported up to this time.

II.

Jurisdiction.

Petitioner in support of the jurisdiction of this court to review the above case on writ of certiorari respectfully states:

(a) STATUTORY PROVISIONS.

The Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938 (28 U. S. C. A. 347), as amended January 31, 1928, Chapter 14, Section 1, 45 Stat. 54, and June 7, 1934, Chapter 425, 48 Stat. 926, provides in part as follows:

> "In any case, civil or criminal, in a circuit court of appeals or in the United States Court of Appeals for the District of Columbia, it shall be competent for the Supreme Court of the United States, upon petition of any party thereto, whether government or other litigate, to require by certiorari either before or after a judgment or decree by such lower court, that the cause be certified

to the Supreme Court for determination by it with the same power and authority and with like affect, as if the case had been brought, by unrestricted appeal."

(b) DATE OF DECREE.

The judgment and decree sought to be reviewed was entered December 3, 1935 (R. 44). Petition for rehearing was duly filed on the 17th day of December, 1935 (R. 51). Petition for rehearing was denied on the 31st day of December, 1935 (R. 52). This petition for certiorari was filed in this court on the .... day of February, 1936.

(c) NATURE OF CASE.

This case began by the filing of claims in the Bankruptcy Court of the Eastern Division of the Eastern District of Missouri. No dispute arose between the claimants or with the trustee as to the amount which should be allowed either petitioner or Respondent City of St. Louis. The whole issue is one of priority of payment. This becomes acute because there are insufficient assets in the estate to pay all taxes which have been allowed in the preferred class of taxes. Many years ago it was a very uncommon occurrence for the assets of the Bankrupt's estate to be insufficient to pay the tax claims which constituted legal demands against the estate. In recent years this situation is occurring frequently as many new and different taxes are being assessed and levied by the Federal, State and local governments. This problem will become increasingly important.

The opinion of the United States Circuit Court of Appeals, Eighth Circuit, in the instant case holds that the equitable or quasi lien claimed by petitioner to be an attribute of the State taxes is not enforceable in bankruptcy, that a proper construction of Section 64 of the Bankruptcy Act does not provide for any priorities as between taxes due the United States, State, county, district or municipality, and that gasoline taxes are to be allowed and paid under the provisions of Section 64b(6) rather than under the provisions of Section 64b(7) of the Bankruptcy Act. This being the

case, it is clear that the subject matter is the construction of a Federal Law, to-wit, the Bankruptcy Act, and the decision being a final decree of a United States Circuit Court of Appeals, jurisdiction to review by certiorari rests in this court.

(d) CASES SUSTAINING JURISDICTION.

Holden vs. Stratton, 191 U. S. 115, 48 L. Ed. 116;
Orcutt Company vs. Green, 204 U. S. 96, 51 L. Ed. 390;
Taylor vs. Voss, 271 U. S. 176, 70 L. Ed. 889.

III.

Facts.

The facts in the instant case are few and undisputed. The bankrupt was a duly licensed distributor of motor vehicle fuels operating in the State of Missouri. He was also licensed under the City of St. Louis for the privilege of storing gasoline and motor vehicle fuels. As such he became obligated to the City to the extent of one cent per gallon on all motor vehicle fuels so stored, and to the State in the amount of two cents per gallon for each gallon of motor vehicle fuels received for sale and distribution in the State of Missouri. Over a period of some nine months the Bankrupt became indebted to the City to the extent of in excess of Nine Thousand Dollars (R. 4, 5, 6, & 7). Over a period of five months the bankrupt became indebted to the State for approximately Eighty-four Hundred Dollars (R. 3). The Respondent Trustee had in his hands less than Twelve Thousand Dollars with which to pay tax claims of over Seventeen Thousand Five Hundred Dollars and some small amount of costs and administration expenses (R. 14). As there were insufficient funds with which to pay the tax claims of both the Respondent City of St. Louis and the Petitioner the question arose as to which claimant was entitled to satisfaction in full of its claim, or whether the funds available should be pro rated between the claimants. The issue is solely one of law involving the proper construction of the Bankruptcy Act.

IV.

Specification of Errors.

1.

The Court erred in adjudging and decreeing that the tax claim of the State of Missouri was not clothed with a lien in the assets of the estate not voided by bankruptcy.

2.

The Court erred in construing Section 64a of the Bankruptcy Act (11 U. S. C. A. 104a) as intending and requiring that state and municipal taxes be allowed and paid on a parity, and in the absence of sufficient funds to pay all taxes in full, that such funds should be pro rated.

V.

Summary of Argument.

1.

A lien exists in favor of petitioner for taxes claimed which is not voided by the bankruptcy act.

2.

If Point 1 of this brief is decided adversely to petitioner it is respectfully urged that the court erred in its construction of the provisions of Sections 64a of the Bankruptcy Act in that:

(a) The lower court's construction of such law is contrary to the spirit and purpose of the Bankruptcy Act.

(b) The lower court's construction of such law ignores the proposition that Federal and State laws are in pari materia with the Bankruptcy Act and all such laws should be construed as having force and effect if they can be construed together.

(c) The lower court's construction of such law ignores the recognized rule that legislative acts are not to be construed as releasing and relinquishing sovereign rights unless such acts do so in plain, specific and unambiguous legislation. If an act is susceptible of two constructions the courts will construe the act as not intending to surrender sovereign or public rights.

3.

Discussion of cases cited in lower court opinion.

VI.

Argument.

1.

A lien exists in favor of petitioner for taxes claimed which is not voided by the bankruptcy act.

In practically every state of the union the common law doctrine of the sovereign being entitled to satisfaction in full of its debt due from an insolvent debtor is effective. That doctrine has been extended in the State of Missouri so as to constitute such right a lien upon the assets of the insolvent debtor. In the early case of State of Missouri to the use of Phillips et al. vs. Rowse, 49 Mo. 586, 592, the Supreme Court of Missouri, the court of last resort, stated:

> "By the common law all debts due the crown were preferred to claims of private citizens. So far as taxes are concerned, every consideration requires that this rule be rigidly observed. The liability for them is not an ordinary one, and cannot be likened to a common debt. Their collection is vital to the enforcement of the law and the very existence of government, and I know of no authority that places the obligation to pay them upon a level with liabilities upon contracts. If the claim of the State were an ordinary one, such as might arise on behalf of an individual, the authorities cited might show that its priority was lost by the assignment, but the obligation to pay taxes can never be so considered, although there may be no express statutory provision upon the subject."

and further the court stated, l. c. 592, 593:

> "The claim of the State may be likened to an equitable lien—one that is not actual and will follow the property into the hands of a bona fide purchaser for value, but still a quasi lien that attaches to the property until it encounters a higher equity. Such liens are not discharged by an assignment for the benefit of creditors. 'The prevailing rule now is that neither

the assignee nor the creditors whom he represents are purchasers for a valuable consideration without notice, as against prior equitable liens. There must be some consideration passing at the time of the assignment, some new responsibility incurred, or some rights given up, to invest an assignee with this character.' (Burr. Assign. 2d ed., 484). The author, on the same page, mistakes the spirit of our decisions when he says that 'in Missouri assignees are treated as bona fide purchasers for valuable considerations,' and refers to Gates v. Labeaume, 19 Mo. 17. The consideration is sufficient to support the assignment as against the statute of frauds, and so it is held in all the States, but it is not such as to cut off equities that were good against the assignor. The assignee, so far, stands in his shoes. * * * *"

Although the foregoing case was decided prior to the enactment of Section 3152 Revised Statutes of Missouri 1929, which section is set out at page 5 of this petition and brief, and is but a legislative declaration of the common law doctrine of the sovereign being entitled to first satisfaction of debts, yet it is certain that by the legislative enactment of this section it was not intended to vary or change the lien determined by the Courts of Missouri to attach to debts due the state. Section 3152 was first enacted in 1881, Laws of 1881, page 35. The title to the Act of which that section was a part, is as follows, "An act to secure to the State of Missouri a priority of *lien* in the case of insolvent debtors to the State." The title of an act is a part of it and should be considered in construing the act. Glaser vs. Rothchild, 221 Mo. 180. This title clearly indicates an intention to create a lien in favor of the State of Missouri and the courts of this state have consistently given the law that construction. The term "debts" as used in Section 3152 Revised Statutes Missouri 1929, has been construed by the court of last resort of this state to include taxes.

State ex rel. Karrenbrock vs. Trust Company, 209 Mo. 471, 491.

From the foregoing it is evident that a lien exists in favor of the state against the assets of the bankrupt for the payment of taxes claimed in the instant proceeding. Let us now consider the question as to the status of such lien under the bankruptcy law. It is recognized that equitable liens are recognized in bankruptcy and enforceable therein.

Hauselt vs. Harrison, 105 U. S. 401, 25 L. Ed. 1075;
Hurley vs. Atchison, Topeka & Santa Fe Railroad, 213 U. S. 126, 53 L. Ed. 729;
Johnson vs. Root Manufacturing Company, 241 U. S. 160, 61 L. Ed. 934.

This court has many times held that under Section 67 of the Bankruptcy Act, all valid liens existing at the time of adjudication except those liens therein especially voided, should be honored and respected by the Bankruptcy Court, and that the legality of the lien is to be governed by the provisions of the state law creating it.

Rock Island Plow Company vs. Reardon, 222 U. S. 354, 56 L. Ed. 231;
Holt vs. Crucible Steel Company, 224 U. S. 252, 56 L. Ed. 756.

Petitioner respectfully urges that by reason of the foregoing the lower court erred in holding and determining "the asserted right of priority (of the state) is not predicated upon any lien that is attached to the property."

2.

If Point 1 of this brief is decided adversely to petitioner it is respectfully urged that the court erred in its construction of the provisions of Sections 64a of the Bankruptcy Act in that;

(a) The lower court's construction of such law is contrary to the spirit and purpose of the Bankruptcy Act.

(b) The lower court's construction of such law ignores the proposition that Federal and State laws are in pari materia with the Bankruptcy Act and all such laws should be construed as having force and effect if they can be construed together.

(c) The lower court's construction of such law ignores the recognized rule that legislative acts are not to be construed as releasing and relinquishing sovereign rights unless such acts do so in plain, specific and unambiguous legislation. If an act is susceptible of two constructions the courts will construe the act as not intending to surrender sovereign or public rights.

(a).

The lower court's construction of Section 64a of the Bankruptcy Act is contrary to the spirit and purpose of the Bankruptcy Act.

The court in its decision held Section 64a of the Bankruptcy Act (11 U. S. C. A. 104a) which reads,

> "the court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district or municipality"

to require that the taxes owing to such taxing authority be paid with equal priority. In so doing, petitioner urges that the court totally ignored the guiding principles and purposes of the Bankruptcy Act. This purpose is tersely stated by Mr. Justice Holmes in the case of Francis vs. McNeal, 228 U. S. 695, 57 L. Ed. 1029, as follows:

> "The business of such an act is, so far as it may be, to preserve and not to upset existing relations."

The existing relations as applied to taxes due petitioner and respondent city have been established as that of superior and inferior political estates. Since the creation of the City of St. Louis by an act of the legislature of the supreme superior political estate, the State of Missouri, the only power that respondent city has to levy and collect a gasoline tax is that which is authorized and directed by the state through its legislative body. This authority is delegated authority given upon a condition, that condition being that in the event any common debtor be unable to satisfy his debt to both the respondent city and the petitioner, that the respondent city will step aside and allow full satisfaction of

petitioner's claim before any funds are available to apply on respondent city's claim. Section 3152 R. S. Missouri 1929. Page 5 of this petition and brief.

From the very inception or creation of the debt the respondent city knew that its claim was inferior to and subject to the prior payment of any state obligation owing by the debtor. The objects and purposes of the Bankruptcy Act are stated in Remington on Bankruptcy, 4th Ed. Section 20 as follows:

> "The objects and purposes of modern Bankruptcy law are two-fold: First, to secure possession of an insolvent's assets and procure an equitable division among creditors, preventing and avoiding attempts of one creditor to obtain unfair advantage over other creditors therein; and second, to free the worthy debtor from the burden of unpaid debts."

What constitutes the obtaining of unfair advantage by one creditor over others? From other provisions of the act, we find that it is considered as the obtaining of legal preference through court procedure when a debtor is insolvent. We find that it may be the voluntary act of insolvent debtor in delivering property and things of value to some general creditor preferred because of personal relationship or otherwise. In general it is the granting of some special privilege to a particular creditor when the nature of the demand he holds does not in itself entitle such creditor to such preference. By comparing the foregoing general principles with the decision in the instant case it is clear that the lower court's decision permits that to be done which the Bankruptcy Act in policy and purpose has sought to prevent. Such a construction elevates the junior and inferior claim of the respondent city to equal dignity of a paramount obligation and requires that creditor who, by the law existing at the time of the inception or creation of the debt, was entitled to a preference to share the bankrupt's estate with one whose claim has been of the junior and inferior nature since its inception. Such an interpretation was never contemplated by the Congress that enacted the law, and nullifies

the purpose for which the law was enacted, to-wit: To preserve and enforce those rights and priorities which legally and equitably were in existence at the time of the bankruptcy (with the exception of legal preference obtained within four months of the Bankruptcy or for the purpose of defrauding creditors, of which the instant case is not an example).

This recognized policy and purpose has been evident in the uniform construction which has been given to statutory liens of various characters not disturbed by Section 67 of the Bankruptcy Act (11 U. S. C. A. 107) and to Section 64b(7) of the Bankruptcy Act, (11 U. S. C. A. 104(7)). Section 64b(7) reads:

> "Debts owing to any person who by the laws of the states or the United States is entitled to priority:"

This provision means that persons who are entitled to any kind of priority under a state or federal law shall constitute the seventh class of preferred claims. This clause does not state that all parties making up class seven pro rate the funds available for such claims, nor does it h terms state the relative priority to be given claims, a between the claimants within this class. Neither does it adopt in so many words the *relative* priority which may exist by virtue of the specific provisions of the state or federal laws creating the preference recognized. The foregoing is certainly true when we compare this section with its predecessor in the Bankruptcy Act of 1867, Section 28, Chapter 176, Page 531, Laws of 1867; Section 5101 (5) Revised Statutes 1878. This classification was provided in that law as follows:

> "All debts to any person who by the laws of the United States are or may be entitled to priority *in like manner as if the provisions of this title had not been adopted.*"

Clearly the Bankruptcy Act of 1867 specifically adopted the *relative* priority to be accorded claims making up this general classification. In the present Bankruptcy Act this

clause has been omitted, yet the courts have uniformly held that the omission of this clause in the present act has not changed the policy and purpose of the present act, to-wit: To preserve rather than to disturb existing relationships.

The cases, in dealing with liens not voided by Section 67 of the Bankruptcy Act have likewise evidenced this intent not to disturb existing relationships.

The very wording of Section 64a, taken in connection with the policy and purpose of the Bankruptcy Act, negatives the conclusion reached by the lower court. The act requires that the taxes "legally due and owing" should be paid. By the use of the term "legally due and owing" Congress has clearly intended that the attributes which legally attach to the various taxes enumerated are to be respected and followed by the trustee in paying the taxes. The use of this term was not by accident or without concern for its true and full meaning. It contemplates that the taxes enumerated should be paid as they are legally due and owing, that those taxes which have a first preference under the law are to be first paid. Any construction short of this fails to give the full and true meaning to the terms used in the Act. As is stated in the case of In Re Falls City Shirt Manufacturing Company, 98 Fed. 592, in respect to what is now Section 64b(7)

> "The plain intention of congress was to recognize liens and priorities thereunder precisely as the state laws had fixed them. In no other way could the priorities given by the state laws be made effective. In no other way could the debts 'entitled to priority' under the state laws be preferred in the distribution of the bankrupt's assets."

So under Section 64a, in no other way can the trustee pay "taxes legally due and owing" without paying them in the order of their relative priority.

(b).

The court erred in failing to construe Section 3152 R. S. Missouri 1929, in pari materia with Section 64a of the Bankruptcy Act.

There is a Federal statute identified as Section 3466 R. S. United States which fills the same office in respect to the Federal Government as Section 3152 R. S. Missouri 1929 fulfills regarding the state government. This section is the pattern from which Section 3152 was taken and reads in part as follows:

> "Whenever any person indebted to the United States is insolvent or whenever the estate of any deceased debtor, in the hands of executors or administrators is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend * * * * to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

The United States Circuit Court of Appeals for the Seventh Circuit in the case of In Re Jacobson, 263 Fed. 883, stated:

> "In other words, Section 64a and 64b of the bankruptcy act are in pari materia with Section 3466."

In the case of In Re E. J. Hibner Oil Company, 264 Fed. 667, the Court by its decision held that said Section 3466 R. S. United States was in pari materia with the bankruptcy law.

In the case of United States vs. Kaplan, 74 Fed. (2d) 664, this Section was held to be in full force and effect except as modified by the bankruptcy act. No distinction can be drawn as a matter of law between this federal act applying to debts due the federal government and Section 3152

R. S. Missouri creating a like priority respecting debts due the State of Missouri.

This Court and the Courts of Appeal have recognized Section 3466 R. S. United States as being in pari materia with Section 64b(7) of the bankruptcy act. That being the case, there is no ground for discrimination between Sections 64a, 64b(6) and 64b(7). We have heretofore pointed out that Section 64b(7) of the bankruptcy act is solely one of classification and does not of its own force and effect require that the claims falling within that classification are to be allowed on an equality or that they be allowed in accordance with the priority established by the relevant state or federal act. Such being the case Section 3466 R. S. United States must be construed as being in pari materia with Section 64a of the bankruptcy act and accordingly Section 3152 R. S. Missouri 1929 must receive a like construction.

It was at one time argued that claims allowed under Section 64b(7) of the bankruptcy act should all be allowed upon an equal basis and paid pro rata. Such was the contention made in the case of In Re Falls City Shirt Mfg. Co., 98 Fed. 592. The claimants were material men who had been allowed priorities subsequent to the landlord's priority. All of the claimants fell within the same classification of the bankruptcy act. The material men took the position that as the bankruptcy act provided the classification of priority and that all claimants falling within that class should receive a pro rata portion of the bankrupt's estate which should be distributed to the claimants in that classification regardless as to the priorities existing between the claimants of that class. The court held against this contention and stated, l. c. 593:

> "* * * * The landlord's lien was in existence June 17, 1899, at and before the adjudication; but the property of the bankrupts certainly did not come into the hands of the trustee until after that time, and probably not until July 3, 1899, when the trustee was appointed and qualified. Not until that event did the lien of the material men arise or exist. It is manifest,

therefore, that the ruling of the referee upon this point was correct, unless, under clause 5, Sec. 64, of the bankruptcy act, all liens arising under the laws of the state are placed upon an even footing, regardless of priorities existing by virtue of the state laws. It is contended on behalf of the material men that such should be the construction of the bankrupt act, but the court is of a different opinion. Section 64 of that act, among other things, provides that debts shall have priority, and that the assets of the bankrupt shall be paid out in a certain order; the fifth in point of preference thereby fixed being 'debts owing to any person who, by the laws of the states or the United States, are entitled to priority.' The effect of the contention of the material men here would be that though all of the creditors had liens created under the laws of the state, and though by those laws some of those liens had priority over others, still a proper interpretation of the bankrupt act would require a general leveling of these liens to a common plane, elevating some and depressing others, so as to destroy all advantage and all distinction given by the state laws. It cannot be admitted that such contention is sound. It seems to the court that it was obviously the intention of congress to recognize all liens created under the laws of the state, and to leave them precisely as it found them. *There does not seem to be any evidence or plausible grounds of contention that congress meant to do anything so unjust or so unjustifiable as a contrary decision would involve.* The plain intention of congress was to recognize liens and priorities thereunder precisely as the state laws had fixed them. * * * * In no other way could the debts 'entitled to priority' under the state laws be preferred in the distribution of the bankrupt's assets. It results, therefore, that the ruling of the referee upon the claim of Glock, and by which he was given a priority in payment to the extent of $640, was correct. He was entitled to it under the laws of the state * * * *."

It is just as logical to argue that all claims falling within Subdivision 64b(7) should be allowed on an equal basis as it is to take the position that all taxes payable under Section 64a are on an equal basis, entitled to the same priority and to be paid accordingly.

In this connecting the distinction between general insolvency laws and specific priority acts should be mentioned. While it is true that general state insolvency laws were suspended by the enactment of the bankruptcy act to the extent that state courts had no jurisdiction to proceed under such insolvency acts yet in the instant case Section 3152 R. S. Missouri 1929 is no part of the general insolvency law of the state. It is a separate and distinct enactment declaratory of the common law existing; amplifying and fortifying the common law priority by establishing a legislative declaration of such right. In this connection we wish to refer to the case of In Re Wright, 95 Fed. 807, 810:

> "* * * 2. Is the debt thus due by the bankrupt to the county of Worcester entitled to priority, under section 64b(5), as a debt owing to a person who is entitled to priority by the laws of Massachusetts? The law of Massachusetts relied upon is Pub. St. c. 157, 104:
>
> 'In the order for a dividend under the preceding section, the following claims shall be entitled to priority, and to be first paid in full in their order: First, all debts due to the United States and all debts due to and taxes assessed by this state, or any county, city or town therein.'
>
> The trustee contends that this section is not now a law of the state of Massachusetts, because, as part of the insolvent law of Massachusetts, it has been suspended by the bankrupt law of the United States. The argument is more ingenious than sound. The bankrupt act of the United States does not repeal or altogether avoid the insolvent laws of the several states, but merely suspends their operation so far as they come in conflict with the bankrupt law, or intrude upon its province. * * * *"

The foregoing case was affirmed by the United States Circuit Court of Appeals, First Circuit, in the case of In Re Worcester County, 102 Fed. 808. While this case dealt specifically with what is now Section 64b(7) of the bankruptcy act concerning debts owing any person who by the laws of the State and United States are entitled to priority, yet it is equally applicable to the provisions of Section 64a

dealing with priorities to be allowed taxes legally due and owing. The Court in closing this opinion made the further pertinent remarks, l. c. 812:

> "In Re Rouse, Hazard & Co., 33 C. C. A. 356, 91 Fed. 96, it was held that a claim for labor performed more than three months before the bankruptcy proceedings, and entitled to priority under the insolvent laws of the state, was not entitled to priority under the bankrupt law; but the decision was rested solely upon the ground that the specific provisions of the bankrupt act concerning labor claims were intended to override the provisions relating to wages made by the state statute. That the exemption accorded by the state statute would have been valid in the absence of the express provisions of the bankrupt act concerning wages was conceded. The bankrupt act makes no such specific provision for debts due to states, counties, and municipalities, and hence, by reference, adopts the statute of Massacnusetts, as part of its own provisions."

As in the foregoing case, the bankruptcy act did not make specific provision as to the relative priority of debts due the state, counties, districts and municipalities, so in the instant case, the bankruptcy act does not specifically designate the relative priorities attributable to taxes due the United States, State, county, district or municipality. As the act is silent on this question, it should be determined according to the relevant law, and in the instant case, the state is to be allowed priority over the city, such priority having been established coincidentally with the creation of the power of taxation granted the city by an act of the general assembly of Missouri over fifty years old.

We also wish to make a few remarks relative to the application by the lower court to the instant case of cases holding that "the right of priority in payment of claims against a bankrupt estate * * * * must be found in the bankruptcy act." That statement is taken from the case of Davis vs. Pringle, 268 U. S. 315, 69 L. Ed. 974, in which case this court held that the United States was not a "person" within the provisions of Section 64b(7) of the Bank-

ruptcy Act, and that therefore an ordinary debt due the United States was entitled to no priority under the provisions of Section 64 of the Bankruptcy Act. It is quite true that if a claimant can point to no provision in the bankruptcy act which will establish his claim within some preferred class he is relegated to the rights of a general unsecured creditor. That statement in the Pringle case supra cannot be extended beyond the proposition there stated. It is elementary that such statements must be considered in view of the circumstances in the case. However, it is not at all applicable to the instant case as clear provision for priority has been established under Section 64a of the Bankruptcy Act. Without question neither Section 3466 R. S. United States or Section 3152 R. S. Missouri standing alone could create a preference (other than a lien) not already provided for in the bankruptcy act, as such would plainly be conflicting with the specific provisions of the bankruptcy act. However, the general order of priority has already been once established by the bankruptcy act and the application of these two sections to claims within the respective classes in no way interferes with or conflicts with the provisions of the bankrupcty act.

(c).

Sovereign rights are not to be released or relinquished in the absence of plain, specific and unambiguous legislation."

This common law right of the sovereign to be first satisfied from assets of the insolvent debtor is as old as the Crown itself. It is thoroughly imbedded in our civil code. Section 3466 United States Revised Statutes, and Section 3152 R. S. Missouri 1929, are each legislative declarations of the common law doctrine of this sovereign right. As stated by Mr. Justice Brandis in the case of United States vs. National Surety Company, 65 L. Ed. 143, 254 U. S. 73, l. c. 75:

"Section 3466, embodying the common law rule by which the sovereign has priority over the other creditors of an insolvent (U. S. vs. State Bank, 6 Pet. 29, 35, 8 L. Ed. 308, 310), declares that 'debts due to the United States shall first be satisfied'."

In the case of State ex rel. Gentry vs. Page Bank, 14 S. W. (2d) 597, (not officially reported), the Supreme Court of Missouri declared that Section 3152 was likewise but a legislative declaration of the existence of the common law doctrine in the State of Missouri. Thus this sovereign right is thoroughly established by the statutory law and judicial decisions of the United States and the State of Missouri.

Legislation which is ambiguous or uncertain will not be presumed to be enacted with an intent to destroy this sovereign right or any other sovereign right, and certainly this right is as important and as well recognized as any common law right of the sovereign. In the case of In Re Tidewater Coal Company, 280 Fed. 648, l. c. 651, this statement is found:

"There is a presumption against any intention to surrender public rights or to affect the government."

Lewis' Sutherland, Statutory Construction (2d) Vol. 2, p. 931, is cited in support of the statement. In the case of Liberty Mutual Insurance Company vs. Johnson Shipyards Corporation, 300 Fed. 952, it is held that there is to be no retreat from sovereign rights without express legislation. In considering the relinquishment of sovereign powers the Supreme Court of the United States in the case of Du-Pont DeNemours and Company vs. Davis, 68 L. Ed. 788, 264 U. S. 456 stated, l. c. 462:

"In taking over and operating the railroad systems of the country the United States did so in its sovereign capacity, as a war measure, 'under a right in the nature of eminent domain' * * * *; and it may not be held to have waived any sovereign right or privilege unless plainly so provided. Moneys and other property derived from the operation of the carrier during federal

control * * * * are property of the United States * * * *. An action by the director general to recover upon a liability arising out of such control is an action on behalf of the United States in its governmental capacity * * * *, and, therefore, is subject to no time limitation, in the absence of a congressional enactment clearly imposing it * * * *."

Section 64a provides in part:

"The trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district and municipality."

There is nothing in that clause stating that such taxes shall be paid pro rata or that they should be paid in like manner as if the provisions of this title had not been adopted. After ordering the taxes paid the specific provisions of the bankruptcy act end. It is by mere assumption or presumption that the court has determined an intention on the part of congress that these taxes should all be paid on an equal basis. Such a decision contemplates that the attitude of congress has changed over the years and that it is no longer the intention of the United States to claim and demand priority in payment of taxes over the State, county, district or municipality. Such a statement is found in the opinion by Judge Holmes in the case of Davis vs. Pringle, supra, but promptly after that decision was handed down denying to the United States a priority for debts due it, the congress of the United States amended pertinent provisions of the bankruptcy act defining "person" so as to include the United States, thereby reasserting the right of the sovereign to prior payment of debts. In view of that act of congress there should be no question or doubt that the congress of the United States had no intention of relinquishing the right of the United States to payment in full of its taxes due from a bankrupt estate before any assets of the estate were distributed for the payment of the taxes due any creditor, State, county, district or municipality, and that had the Congress intended that funds which could be applied to payment of

taxes under Section 64a of the Bankruptcy Law should be pro rated between the various taxing authorities presenting claims it would have so specifically provided and not left the matter to surmise and conjecture. The opinion of the lower court has construed away the sovereign right of the United States and of the State of Missouri to prior payment of taxes. The Federal Judiciary has in the past always construed federal laws so as to avoid encroaching upon the sovereignty of the states. Only when the law by its plain, certain and unambiguous language has required the abolition of a state right has the Federal Judiciary so rendered its decision, and for this reason alone petitioner respectfully asserts that the lower court has misconstrued Section 64a of the Bankruptcy Act.

3.

Discussion of cases cited in lower court opinion.

The intention and meaning of Section 64a of the Bankruptcy Act has in the past been obstructed and obscured by the remarks of this court in the case of New Jersey vs. Anderson, 203 U. S. 483, 492; 23 S. Ct. 137, 51 L. Ed. 284, and by a few lower court decisions wherein the remarks of the court have been obitur dictum or have failed to consider the views hereinbefore expressed. Petitioner realizes that the discretion of this honorable court cannot be called into exercise unless some extraordinary reason is shown therefor. Petitioner believes that the unfortunate remarks of this court in the case of New Jersey vs. Anderson supra have had a great bearing upon the decisions of the lower courts on the issue here involved. These remarks are contained in a short paragraph at the opening portion of the opinion and are as follows, l. c. 489:

> "The requirement of the present law is a wide departure from the act of 1867 and specifically obligates the trustee to pay all taxes legally due and owing without distinction between the United States and the State, county, district or municipality."

That remark is not in the least necessary for a determination of the issue there involved as the sole question before the Court at that time was whether or not state taxes due the State of New Jersey should be allowed and paid as a preferred claim or as a general unsecured claim. There was no controversy between the State of New Jersey and any other tax claimant, the sole question was whether or not a franchise tax was a tax within the meaning of the pertinent provisions of the bankruptcy act. While it is true that a comparison between the acts of 1867 and 1898 was considered in the foregoing quoted statement, a like comparison of the acts of 1867 and 1898 in respect to Section 64b(7) would have required the court to make the statement that all claims allowable under Section 64b(7) should be ordered paid "without distinction." This statement of the Court is being used as a guide by lower courts in construing Section 64a of the present bankruptcy act and this court should not longer permit the lower courts to pass upon such weighty matters without this court thoroughly considering and determining the proper rule to be applied. Under present conditions one of the most involved and pressing problems with which Bankruptcy Courts are required to deal is that of taxes. With ever increasing Federal, State and local taxes a much greater proportion of the bankrupt's estate is being paid to satisfy these claims. There are many many cases in which the assets of the estate are insufficient to pay all tax claims. This office now has on hand a number of pending tax proceedings wherein this case will serve as a rule and guide. Each year there has been a great increase in gasoline taxes. State sales tax problems have recently been adopted. These together with the many new federal excise taxes will cause many more conflicts between the taxing authorities over the estates which are insufficient to meet the tax demands. The lower courts should be fully and finally advised in an authoritative opinion of this court as to the proper construction of Section 64a of the Bankruptcy Act.

The opinion of the lower court in the instant case has cited cases in support of its conclusion other than the case of New Jersey vs. Anderson, supra. We desire to discuss these briefly.

In the case of City of Waco vs. Bryan, 127 Fed. 17, the Circuit Court of Appeals for the Fifth Circuit had before it the question as to whether or not the trustee should pay taxes claimed by the City of Waco in the amount of some $500.00 which were a lien upon property, less than ten per cent of which never came into the hands of the trustee. No issue was made as to the priority between taxes under Section 64a of the Bankruptcy Act. The whole issue was whether or not the act required the payment of taxes when the bankrupt court did not receive benefit of the property. From the order of the court it was clear that the taxes were to be paid "in advance of payment of dividends to creditors." That was the issue.

In the case of A. J. Waterman Manufacturing Company, 291 Fed. 589, the District Court of the Southern Division of Maine was confronted with a claim of $8,000.00 due the United States and $6,000.00 due the City of Portland, with but $6,000.00 in the estate with which to pay these claims and the costs of administration. The district court considered at great length the claim that the United States was entitled to payment of its taxes prior to payment of costs of administration but it dismissed the claim of the United States that the United States was entitled to priority over the City of Portland with a mere statement that "That section (64a) is distinct in putting all taxes on an equality." The court made no distinction between the points and determined the latter upon the reasoning of the former. In doing so it acted erroneously and its decision cannot be construed as authority on the point.

In the case of In Re Wiley, 292 Fed. 900, the District Court of the Northern Division of Georgia had before it an estate wherein the United States claimed $4,000.00 in taxes and the State $400.00. The bankrupt's estate consisted of approximately $2,300.00. The Court held that

the taxes were to be paid pro rata, basing its decision upon the proposition that, l. c. 901:

> "Debts due the United States are given a first priority, apparently extending to cases of bankruptcy by R. S. Sec. 3466 (Comp. St. Sec. 6372); but taxes are hardly to be considered debts (N. J. vs. Anderson, 203 U. S. 483, 492; 27 S. Ct. 137, 51 L. Ed. 284."

This of course is not as correct a statement of the law as it exists today as has much more recently been held in the case of Price vs. United States, 269 U. S. 492, 70 L. Ed. 373. In the latter case it was held that in federal priority statutes the term "debts" includes taxes, referring specifically to United States Revised Statutes, Section 3466.

In the case of A. E. Fountain Incorporated, 295 Fed. 873, the District Court of the Southern Division of New York had before it an estate wherein the State of New York was claiming franchise taxes and the commissioner of internal revenue was claiming various taxes due the United States. However, an agreement to divide the fund pro rata between the State of New York and the United States was entered into. Under those circumstances the holding is not to be given great weight.

In view of the foregoing petitioner asserts that the law in respect to proper construction of Section 64a of the Bankruptcy Act is in an uncertain and confused state. That the lower courts have been groping in the dark, occasionally following the obitur dictum of the New Jersey vs. Anderson case supra, and that the entire question should be fully and completely decided by this court.

VII.

Conclusion.

Petitioner respectfully asserts that this case is not one involving mere local interests or an isolated instance of conflict in tax claims. In the last two years a great number of cases have been handled by the Attorney-General's

Office of the State of Missouri wherein this identical problem has arisen. Many of these cases are now pending. A like situation exists in every state of the Union. With the advent of the Sales Tax as a new means of raising state revenue and with the levy of numerous additional federal excise taxes, the greater portion of which are clothed with specific statutory lien, this problem is and will be one of increasing importance. This Court in the case of New Jersey vs. Anderson supra has made a statement purportedly construing Section 64a of the Bankruptcy Act, which statement is but obitur dictum and was not made after a thorough and extensive study of the particular provision. The comparison of the acts of 1867 and 1898 which was made was the only consideration upon which the statement was based. The facts which petitioner have placed before the court as to the construction of this section are pertinent and outweigh the reason upon which the statement in New Jersey vs. Anderson was based.

We respectfully submit that the petition for writ of certiorari should be granted.

Respectfully submitted,

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CHARLES ELMORE CR

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1935.

No. [redacted] 3

STATE OF MISSOURI, Creditor, Petitioner, vs. JOHN T. ROSS, Trustee, et al., Respondents.	Circuit Court of Appeals, Eighth Circuit, Nos. 10,239 and 10,281.

BRIEF IN OPPOSITION TO ISSUANCE OF THE WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1935.

No. 782.

STATE OF MISSOURI, Creditor, Petitioner, vs. JOHN T. ROSS, Trustee, et al., Respondents.	Circuit Court of Appeals, Eighth Circuit, Nos. 10,239 and 10,281.

BRIEF IN OPPOSITION TO ISSUANCE OF THE WRIT OF CERTIORARI.

I.

OPINIONS.

Petitioner's statement, under its title, at page 10 of its brief, is adopted by the respondents, except that the opinion of the United States Circuit Court of Appeals (Eighth Circuit) has been reported in 80 Fed. (2d) 329.

II.

JURISDICTION.

(a) **Statutory Provision.** It is admitted that the statutory provision relating to certiorari is correctly set out in paragraph (a) of subdivision II of petitioner's brief.

(b) **Date of Decree.** It is admitted that petitioner's petition for certiorari was filed as set forth in paragraph (b) of subdivision II of appellant's brief.

(c) **Nature of Case.** Petitioner, under this paragraph of subdivision II of its brief, states that "the United States Circuit Court of Appeals, Eighth Circuit, in the instant case, holds that the equitable or quasi lien claimed by petitioner to be an attribute of the state taxes is not enforceable in bankruptcy." The opinion of the Court held that the claim of the State of Missouri was not a lien, equitable, quasi or otherwise, and that Section 64-b of the Bankruptcy Act (11 U. S. C. A. 104-b) placed all taxes—United States, state, county, district or municipality—upon a basis of equality.

(d) **Cases Sustaining Jurisdiction.** Under this paragraph of subdivision II of petitioner's brief, counsel cites three cases. However, certiorari is not a writ of right, but its issuance is discretionary.

Ireland v. Woods, 246 U. S. 323, l. c. 328;
Twitchell v. Pennsylvania, 7 Wall. 321;
Philadelphia & R. Coal and Highway Co. v. Gilbert, 245 U. S. 162.

III.

FACTS.

The facts as set forth under subdivision III of petitioner's brief are admittedly correct.

SUMMARY OF ARGUMENT.

I.

(a) Section 3466, U. S. Revised Statutes, does not establish a lien, but merely provides for the priority of payment of certain debts due the United States.

U. S. v. Fisher (1804), 2 Cranch 358, 2 L. Ed. 304;
Beaston v. The Farmers Bank of Delaware (1838), 12 Peters 102, 9 L. Ed. 1017.

(b) The construction of Section 3466 by the United States Supreme Court was adopted by the State of Missouri, along with the statute in 1881.

General Box Co. v. Mo. Utilities, 331 Mo., l. c. 857, 55 S. W. (2), l. c. 447.

II.

The general provisions contained in Section 3466 (Title 31, Sec. 191, U. S. C. A.) and in the similar Section 3152, R. S. Mo. 1929, are superseded by the specific provisions dealing completely with one subject.

Cook County National Bank v. U. S., 107 U. S. 445, 27 L. Ed. 537, 2 Sup. Ct. 561;
In re Holland Banking Co., 313 Mo. 307, 281 S. W. 702;
State v. Farmers Exchange Bank, 331 Mo. 689, 56 S. W. (2d) 129;
In re Slonka, 122 Fed. 630.

III.

The Bankruptcy Act takes into consideration the whole range of indebtedness of a bankrupt and the order of payment to creditors.

Guaranty Title & Trust Co. v. Title Guaranty & Surety Co., 224 U. S. 152, 32 S. Ct. 457, 56 L. Ed. 706;
Davis v. Pringle, 268 U. S. 315, 69 L. Ed. 974, 45 Sup. Ct. 352;
Reese v. U. S., 75 Fed. (2d) 9;
In re Inland Dredging Corporation, 61 Fed. (2nd) 765;
In re Lewis, 99 Fed. 936;
In re Vidal, 233 Fed. 733;
In re Rouse, Hazard & Co., 91 Fed. 96.

IV.

Under Section 64b, Paragraph 6, all taxes, whether due to the United States, state, county, district or municipality, are placed on a parity.

New Jersey v. Anderson, 203 U. S. 483, 51 L. Ed. 284, 27 Sup. Ct. 137;
In re A. J. Waterman Mfg. Co., 291 Fed. 589;
In re A. E. Fountain, Inc., 295 Fed. 873;
City of Waco v. Bryan, 127 Fed. 79;
Dallas v. Ryan, 22 A. B. R. (N. S.) 378;
In re Wyley, 292 Fed., l. c. 902.

ARGUMENT.

I.

(a) Section 3152, R. S. Mo. 1929, under which petitioner claims an equitable or quasi lien, is modeled after Section 3466, U. S. Revised Statutes.

In the early case of U. S. v. Fisher, 2 Cranch 358, 2 L. Ed. 304, the Court held that Section 3466, U. S. Revised Statutes, did not establish a lien, but only a priority in payment. The Court, in part, said:

> "On this subject it is to be remarked that no lien is created by this law (now 3466); no bona fide transfer of property in the ordinary course of business is overreached. It is only a priority in payment, which, under different modifications, is a regulation in common use, and this priority is limited to a particular state of things when the debtor is living, although it takes effect generally when he is dead."

In Beaston v. Farmers Bank of Delaware, 12 Peters 102, 9 L. Ed. 1017, the evidence showed that Beaston owed the Elkton Bank $500.00 on a judgment; that both the United States and the Farmers Bank had obtained a judgment against the Elkton Bank, an insolvent institution, and that the Farmers Bank attached the money in Beaston's hands owing to the Elkton Bank in 1830; the United States doing likewise in 1831. Beaston paid the United States, contending that under the fifth section of the Act of 1797 (now 3466) the United States had priority to the money. In denying the priority of the claim of the United States the Supreme Court, in part, said:

> "From the language employed in this section and the construction given to it from time to time by this

Court, these rules are clearly established: first, that no lien is created by the statute."

(b) The construction of section 3466 by the United States Supreme Court was adopted by the State of Missouri along with the statute in 1881.

In a recent decision, General Box Co. v. Missouri Utilities, 331 Mo., l. c. 857, the Missouri Supreme Court held that:

> "The law is well settled that when one state adopts a statute of another state which the courts of that state have construed, then such construction will be held to have been adopted along with the statute."

II.

In the Cook County National Bank Case, 107 U. S. 445, 2 Sup. Ct. 561, 27 L. Ed. 537, the Treasury Department held bonds of an insolvent bank to secure its circulating notes, and after selling the bonds and applying the proceeds to redeem the notes, had on hand $30,000 to the bank's credit. The bank, however, owed the Government $20,000 for postal funds and money order funds deposited with it by the Post Office Department. The question was whether under the provisions of 3466 the Government's claim had priority over general claims. In holding that the provisions of 3466 did not apply, for the reason that the National Banking Law was a complete system for the establishment and government of national banks, and was neither limited nor enlarged by other statutory provisions, the Court, in part, said:

> "These provisions (dealing with the liquidation of insolvent national banks) must be deemed, therefore, to withdraw national banks, which have failed, from

the claims of insolvent persons out of whose estates demands of the United States are to be paid in preference to the claims of other creditors. The law of 1797, re-enacted in the Revised Statutes giving priority to the demands of the United States against insolvents, cannot be applied to demands against those institutions. The provisions of that law and of the National Banking Law, being, as applied to national banks, inconsistent and repugnant, the former law must yield to the latter, and is, to the extent of the repugnancy, superseded by it. The doctrine as to repugnant provisions of different laws is well settled and has often been stated in decisions of this Court. A law embracing the entire subject, dealing with it in all its phases, may thus withdraw the subject from the operation of the general law as effectually as though, as to such subject, the general law were in terms repealed. The question is one respecting the intention of the Legislature, and although as a general rule, the United States are not bound by the provisions of a law in which they are not expressly mentioned, yet, if a particular statute is clearly designed to prescribe the only rules which should govern the subject to which it relates, it will repeal any former one as to that subject."

The Supreme Court of Missouri followed this principle in the Holland Banking Case, 313 Mo. 307, 281 S. W. 702. The Court held that the provisions of the general priority statute, now 3152, were superseded as to the state funds in an insolvent bank by the state depository law, saying, in part:

"We are satisfied that the decided trend of the better reasoned cases is to the effect that where a state has a general statute, giving priority to the debts due the state, and where such state also has a depository

law directing the deposits of the state's funds in selected depositories, which are required to give full and adequate security equal to or in excess of such deposits as may lawfully be made therein, and where no preference over and above the protection of such security is specifically provided for in such depository law, the state will be deemed to have waived its priority rights under the general priority statute."

Again, in State v. Farmers Exchange Bank, 331 Mo. 689, 56 S. W. (2) 129, the Court held that the priority provided by Section 3152 was superseded by "a comprehensive and complete scheme * * * for the liquidation in the distribution of their assets when insolvent * * *. In that statute we find provisions relative to preferences to the state, which we think clearly show an intent on the part of the Legislature to waive any priority which otherwise might have been claimed by the state under the prior general statute."

III.

In Guaranty Title & Trust Co. v. Title Guaranty & Surety Co., 224 U. S. 152, 32 Sup. Ct. 457, 56 L. Ed. 706, a surety who was subrogated to the rights of the United States claimed that by reason of Section 3466, R. S., its claim had priority over labor claims. In denying this contention, the Supreme Court, in part, said:

"The Bankruptcy Act of 1867, as we have seen, provided for priority, first, for the payment of expenses, and, second, of 'all debts due to the United States and all taxes and assessments under the laws thereof.' The priority therefore given by the Bankruptcy Act was coextensive with the priority given by the Statute of 1797. In other words, to repeat, there was a reaffirmation by the Bankruptcy Act of the

Statute of 1797, but there is not such affirmation by the Bankruptcy Act of 1898 of that statute, which still exists, as we have said, as Section 3466 of the Revised Statutes. There is a change of provisions, and we come to the question if there is a change of purpose * * *. A different order is prescribed by the Act of 1898 and something more. Labor claims are given priority, and it is provided that the debts having priority shall be paid in full. The only exception is 'taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality.' These are civil obligations and not personal conventions, and preference was given to them, but as to debts, we must assume a change of purpose in the change of order, and we cannot say that it was inadvertent. **The act takes into consideration, we think, the whole range of indebtedness of a bankrupt—national, state and individual—and assigns the order of payment.** The policy which dictated it was beneficial and well might induce a postponement of the claims, even of the sovereign, in favor of those who necessarily depend upon their daily labor, and to give such claims priority could in no case seriously affect the sovereign."

In Davis v. Pringle, 268 U. S. 315, 45 Sup. Ct. 352, 69 L. Ed. 974, the Court held that the term "person" contained in Paragraph 5 (now 7) of Section 64-b of the Bankruptcy Act did not include the United States. The Court, however, in leading up to the main question, said:

"**It may be assumed that the priority must be found, if at all, in the Bankruptcy Act, and in its supposed incorporation of Revised Statute 3466.** That act, as was said in Guaranty Title & Trust Co. v. Title Guaranty & Surety Co., 224 U. S. 152, takes into consideration * * * the whole range of indebtedness

of the bankrupt—national, state and individuals—and assigns the order of payment."

This principle was followed in the case of Reese v. U. S., 75 Fed. (2) 9, where it is said:

> "It may be true, as it is contended, that a general judgment lien, not levied on specific property before the date of insolvency, cannot stand against the priority given the United States, where section 191 (3466) controls, but here the Bankruptcy Act controls, and it is held to have superseded the priority statute in cases of bankruptcy."

This principle is further established in the case of In re Inland Dredging Corporation, 61 Fed. (2d) 765, wherein the Court says:

> "We do not of course mean that a state statute may control the distribution of bankrupt estates. The priority arises under section 64b (7), which incorporates the state law pro tanto; and the hierarchy of claims—the order of their priority—is fixed by that section. Hence we ignore the provision of section 130 that premiums shall be paid immediately after claims for wages. They take their place in the order prescribed by section 64b (7), regardless of where section 130 puts them."

In re Slonka, 122 Fed. 630, holds that "no principle of statutory construction is better settled than that which displaces the application of general provisions to a particular subject when there are specific provisions applicable to it in the same act."

In the matter of **Lewis, 99 Fed. 936**, the Court says:

> "In other words, although the laws of a state giving priority to certain debts are by section 64b, class 5

(now 64b, class 7), introduced into the scheme of the present Bankruptcy Act, yet such state laws are so introduced only so far as to the debts to which they give priority are not expressly dealt with as to priority in the Bankruptcy Act itself. Where both a state law and the Bankruptcy Act give priority to the same class of debts the Bankruptcy Act not only controls the state law in the case of absolute conflict between the two, but by its express regulation of its priorities, excludes the state law altogether."

And, in the case of **In re Consumers Coffee Co.**, 18 A. B. R. 500, the Court said:

"Even if a lien, properly so called, exists under the Pennsylvania statute for rent in arrears at the time when the proceedings in bankruptcy were begun, the statute cannot override the act of Congress. While the priority of the landlord's claim is undoubtedly preserved in clause (b) (5) of section 64, this priority is not over all other claims whatever, but only over those that are not specified in the section as being even higher in right. The order of distributing the assets of a bankrupt having thus been expressly laid down by Congress, that order must be followed by the federal court * * *."

IV.

Taxes due and owing by the bankrupt to the United States, state, county, district or municipality are assigned to payment in sixth position under paragraph (b) of Section 64, 11 U. S. C. A. 104-a, and payment is provided for upon an equality and "without distinction."

This Court, the various courts of appeals and district courts seem to be in complete harmony and agreement upon this question. This Court, in **New Jersey v. Anderson**, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284, said:

> "The requirement of the present law is a wide departure from the Act of 1867, and specifically obliges the trustee to pay all taxes legally due and owing, without distinction between the United States and the state, county, district or municipality."

The Circuit Court of Appeals, Fifth Circuit, in **City of Waco v. Bryan**, 127 Fed. 79, said:

> "The present bankruptcy law gives priority for all taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality in advance of the payment of dividends to creditors. In short, it puts taxes due the state, counties and municipalities upon the same footing as taxes due the United States."

The same court, in **Dallas v. Ryan**, 22 A. B. R. (N. S.) 378, says:

> "Section 64 gives the rule for paying out the money derived from the bankrupt's property which remains for general distribution after all special liens and encumbrances have been dealt with."

Valid liens on the bankrupt's property are to be first satisfied; next, the priority claims mentioned in section 64 are to be paid, then any balance remaining is to be distributed as dividends to general creditors. Section 64, as amended by the Act of May 27, 1926, divides the priority items into seven classes, numbers them 1 to 7, and requires payment in the order in which they are thus numbered. Class 6 provides for "all taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality." "Debts owing to any person by the laws of the states or the United States are entitled to priority," are seventh, and last, in the order of payment.

The case of **In re A. J. Waterman Mfg. Co.**, 291 Fed. 589, involved the question of priority between a claim of the United States for taxes and a claim of the City of Portland for taxes. The Court said:

> "Subsection 'a' of Section 64 of the Bankruptcy Act puts all taxes in one class, and in a class prior to all claims enumerated in section 'b.' I cannot sustain the contention of the United States that the United States has priority in the matter of taxes over the City of Portland. That section is distinct in putting all taxes upon an equality. For the reasons which I have given, I allow the claims for the administration of the estate to have priority over the taxes. I allow, also, the expenses of the common-law assignees in preserving the estate to have priority over the claims for taxes, they being found to be beneficial to the estate. After allowing priority to such claims—namely, for administration for the benefit of creditors and for the services and disbursements of the common-law assignees in preserving the estate—there will remain the sum of $4,468.30 to be divided between the tax claims. I have instructed the Special Master to divide this sum in proportion to the amounts of the claims of the United States, and of the City of Portland, with interest. He has made this division. The allowance for taxes appears in the schedule of amounts allowed, filed with this opinion."

The Court here held that section 3466 was superseded by the Bankruptcy Act. Also, in the case of **In re A. E. Fountain, Inc.**, 295 Fed. 873, the Referee had ordered "the tax of the United States and the State of New York to be prorated and paid pari passu." In affirming this order the District Court said:

> "The taxes under the foregoing provisions of the Bankruptcy Act are not directed to be paid in any

precise order, although the United States is mentioned first. As the act carefully provides in subdivision b the order of payment of various items by placing them under separate numerals, it seems reasonable to contend that it would have done this in respect to taxes if Congress had intended any discrimination in priority between taxes due the United States and taxes due the states and **political subdivisions thereof.**"

CONCLUSION.

We believe that the above authorities overwhelmingly hold that the order of distributing the assets of a bankrupt has been expressly laid down by Congress; that the Bankruptcy Act supersedes Section 3152, Revised Statutes of Missouri 1929, and provides for the payment of the tax claims of the State of Missouri and the City of St. Louis upon a pro rata basis.

Petitioner has invited the Court's attention to the fact that, with the addition of new taxes, this question is becoming increasingly more important. If this be true, then we believe it all the more apparent that a municipality possessing only such taxing powers as are granted by the state, should be entitled to the protection afforded and established by the clear authority of the cases, to the end that upon its claim for taxes it will receive at least a pro rata payment. If the federal and state taxes are increasing, as the Attorney-General points out, then the municipality, limited as it is in the exercise of the taxing power, should, upon its proportionately smaller claim, be entitled to share pro rata.

The Court, in **In re Wyley**, 202 Fed., l. c. 902, said:

"Considering the dual nature of our Government,

and that neither the Union nor the states may destroy or hinder the other in several functions, and all have an equal need of their revenues, it is concluded that the intent of Congress was that there should be a pro rata payment upon all the taxes claimed in section 64 (a) when the available fund is not sufficient to pay, in full, the taxes due the United States, having no priority over the others * * *."

The authorities are uniformly and correctly opposed to the contentions of petitioner, and we respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1936.

No. 3.

STATE OF MISSOURI, Creditor, Petitioner, vs. JOHN T. ROSS, Trustee, et al., Respondents.	Circuit Court of Appeals, Eighth Circuit. Nos. 10,239 and 10,281.

STATEMENT, BRIEF AND ARGUMENT IN BEHALF OF RESPONDENT, THE CITY OF ST. LOUIS.

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Supreme Court of the United States.

OCTOBER TERM, 1936.

No. 3.

STATE OF MISSOURI, Creditor, Petitioner, vs. JOHN T. ROSS, Trustee, et al., Respondents.	Circuit Court of Appeals, Eighth Circuit. Nos. 10,239 and 10,281.

STATEMENT, BRIEF AND ARGUMENT IN BEHALF OF RESPONDENT, THE CITY OF ST. LOUIS.

STATEMENT.

At the time of its adjudication in bankruptcy, the Laessig's Oil Products Company, of which respondent John T. Ross became trustee, was indebted to the State of Missouri for motor vehicle fuel tax in the sum of $8,580.20, and to the City of St. Louis for a similar tax in the sum of $9,026.30. The state tax amounted to 2 cents for each gallon of motor vehicle fuel received for sale and distribution in the state; the city tax amounted to 1 cent per gallon. The trustee, after paying the expenses of administration and preferred wage claims, had on hand $11,867.18. As this amount was less than the total of the

allowed claims of the State and City, the question arose as to whether the State and City should share equally the balance of the estate, or whether, as the State contended, the State should receive the full amount of its claim prior to the payment of the City's claim. The Referee in Bankruptcy allowed both claims on an equal basis, and this ruling was upheld in both the District Court and the Circuit Court of Appeals, Eighth Circuit. The opinion of the Circuit Court of Appeals is reported in 80 Federal (2d) 329. As stated in the brief of petitioner, on page 11:

> "No dispute arose between the claimants or with the trustee as to the amount which should be allowed either the petitioner or respondent City of St. Louis. The whole issue is one of priority of payment."

The Statutes Involved.

The following statutes are involved in this cause:

Section 67d of the Bankruptcy Act:

> "(d) Liens given or accepted in good faith and not in contemplation of or in fraud upon the provisions of this title, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by anything herein" (11 U. S. C. A. 107 [d]).

Section 64 of the Bankruptcy Act:

> "(a) The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality, in the order or priority as set forth in paragraph (b) hereof: *Provided,* That no order shall be made for the payment of a tax assessed against real estate of a bankrupt in excess of the value of the interest of the

bankrupt estate therein as determined by the court. Upon filing the receipts of the proper public officers for such payments the trustee shall be credited with the amounts thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

"(b) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expense of such recovery; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary and involuntary cases, as the court may allow; (4) where the confirmation of composition terms has been refused or set aside upon the objection and through the efforts and at the expense of one or more creditors, in the discretion of the court, the reasonable expenses of such creditors in opposing such composition; (5) wages due to workmen, clerks, traveling or city salesmen, or servants, which have been earned within three months before the date of the commencement of the proceeding, not to exceed $600 to each claimant; (6) taxes payable under paragraph (a) hereof and (7) debts owing to any person who by the laws of the States or the United States is entitled

to priority: *Provided,* That the term 'person' as used in this section shall include corporations, the United States and the several States and Territories of the United States" (11 U. S. C. A. 104).

Section 3152, R. S. Mo. 1929, provides in part as follows:

"Whenever any person indebted to the State of Missouri is insolvent * * *, the debts to the State of Missouri shall be first satisfied, and the priority hereby established shall extend as well to cases in which a debtor not having sufficient property to pay all his debts, makes a voluntary assignment thereof * * *. As to cases in which an act of bankruptcy is committed: Provided that nothing in this article contained shall be construed to interfere with the priority of the United States as secured by law * * *."

Section 3466, U. S. Revised Statutes (31 U. S. C. A. 191):

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

SUMMARY OF ARGUMENT.

I.

(a) Section 3466, U. S. Revised Statutes (31 U. S. C. A. 191), does not establish a lien, but merely provides for the priority of payment of certain debts due the United States.

United States v. Fisher (1804), 2 Cranch. 358, 2 L. Ed. 304;
Beaston v. Farmers Bank of Delaware (1838), 12 Peters 102, 9 L. Ed. 1017.

(b) The construction of section 3466 by the United States Supreme Court was adopted by the State of Missouri along with the statute in 1881, the said Missouri statute now being Section 3152, R. S. Mo. 1929.

General Box Co. v. Missouri Utilities, 331 Mo. 845, 55 S. W. (2d) 442.

(c) As construed by the courts of Missouri, section 3152 does not create a lien.

In re Holland Banking Co., 313 Mo. 307, 281 S. W. 702;
State v. Farmers National Bank, 331 Mo. 685, 56 S. W. (2d) 129.

II.

The general provisions contained in Section 3466 (31 U. S. C. A. 191), and in the similar Section 3152, R. S. Mo. 1929, are superseded by the specific provisions dealing completely with one subject.

Cook County National Bank v. United States, 107 U. S. 445, 2 Sup. Ct. 561, 27 L. Ed. 537;

In re Holland Banking Co., 313 Mo. 307, 281 S. W. 702;
State v. Farmers Exchange Bank, 331 Mo. 685, 56 S. W. (2d) 129.

III.

The Bankruptcy Act takes into consideration the whole range of the indebtedness of a bankrupt and the order of payment to creditors.

Davis v. Pringle, 268 U. S. 315, 45 Sup. Ct. 549, 69 L. Ed. 974;
Guarantee Title & Trust Co. v. Title Guaranty & Surety Co., 224 U. S. 152, 32 Sup. Ct. 457, 56 L. Ed. 706.

IV.

Under Section 64 of the Bankruptcy Act all taxes, whether due to the United States, state, county, district, or municipality, are placed on an equal basis.

New Jersey v. Anderson, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284;
In re A. E. Fountain, Inc., 295 Fed. 873;
In re Wyley, 292 Fed. 900;
In re A. J. Waterman Mfg. Co., 291 Fed. 589;
City of Waco v. Bryan, 127 Fed. 79;
Dallas v. Ryan, 22 A. B. R. (N. S.) 378;
Reese v. United States, 75 Fed. (2d) 9;
In re Inland Dredging Corporation, 61 Fed. (2d) 765;
In re Vidal, 233 Fed. 733;
In re Lewis, 99 Fed. 936;
In re Rouse, Hazard & Co., 91 Fed. 96;
In re Slonka, 122 Fed. 630;
In re Consumers' Coffee Co., 18 A. B. R. 500.

V.

The power of Congress to enact a complete bankruptcy law is not limited by the sovereignty of the states.

Board of Trade v. Johnson, 264 U. S. 1, 44 Sup. Ct. 232, 68 L. Ed. 533.

VI.

The dictum announced by this Court in the case of New Jersey v. Anderson, supra, in 1906, has evoked no clarifying measures by Congress, and has been followed by inferior federal courts.

Newman v. Lynchburg Investment Corporation, 236 U. S. 692, 35 Sup. Ct. 477, 59 L. Ed. 792;
In re A. E. Fountain, Inc., 295 Fed. 873;
In re Wyley, 292 Fed. 900;
In re A. J. Waterman Mfg. Co., 291 Fed. 589.

ARGUMENT.

I.

(a) **Section 3466, U. S. Revised Statutes (31 U. S. C. A. 191), does not establish a lien, but merely provides for the priority of payment of certain debts due the United States.** This section, with slight modifications, has been on the statute books since 1797, and the courts have consistently held that it merely provides for priority of payment in certain cases, and does not establish a lien.

In the early case of **United States v. Fisher**, 2 Cranch. 358, 2 L. Ed. 304, the Court, in part, said:

> "On this subject it is to be remarked that no lien is created by this law (now 3466); no bona fide transfer of property in the ordinary course of business is overreached. It is only a priority in payment, which, under different modifications, is a regulation in common use, and this priority is limited to a particular state of things when the debtor is living, although it takes effect generally when he is dead."

In the later case of **Beaston v. Farmers Bank of Delaware**, 12 Peters 102, 9 L. Ed. 1017, this Court again stated the principle that section 3466 did not establish a lien. In this case the evidence showed that Beaston owed the Elkton Bank $500 on a judgment; that both the United States and the Farmers Bank had obtained a judgment against the Elkton Bank, an insolvent institution, and that the Farmers Bank, in 1830, attached the money in Beaston's hands which he owed to the Elkton Bank, the United States doing likewise in 1831. Beaston paid the United States, contending that under the fifth section of the Act of 1797 (now Section 3466) the United States had

priority to the money. In denying Beaston's contention, this Court, in part, said:

> "From the language employed in this section and the construction given to it from time to time by this Court, these rules are clearly established: First, that no lien is created by the statute • • •."

(b) **The construction of section 3466 by the United States Supreme Court was adopted by the State of Missouri along with the statute in 1881, said Missouri statute now being Section 3152, R. S. Mo. 1929.** The courts of Missouri have followed the general principle that when a state adopts a statute of another state it adopts the construction theretofore given, along with the statute.

In the recent decision of **General Box Co. v. Missouri Utilities**, 331 Mo. 845, l. c. 857, the Missouri Supreme Court stated:

> "The law is well settled that when one state adopts a statute from another state which the courts of that state have construed, then such construction will be held to be adopted along with the statute."

(c) **As construed by the courts of Missouri, section 3152 does not create a lien.** While the courts of Missouri have not directly passed on this point, they have indicated by inference that the statute merely provides for a priority payment. In discussing the state depository law and its effect upon Section 3152, R. S. Mo. 1929, the Supreme Court, in the case of **Holland Banking Co.**, 313 Mo. 307, 281 S. W. 702, stated, in part:

> "We are satisfied that the decided trend of the better reasoned cases is to the effect that where a state has a general statute, **giving priority to the**

debts due the state, and where such state also has a depository law directing the deposits of the state's funds in selected depositories which are required to give full and adequate security equal to or in excess of such deposits as may lawfully be made therein, and where no preference over and above the protection of such security is specifically provided for in such depository law, the state will be deemed to have waived its **priority rights under the general priority statute.**"

The Supreme Court of Missouri, in **State v. Farmers National Bank**, 331 Mo. 689, 56 S. W. (2d) 129, again assumed that section 3152 merely provided a priority when it held that the priority provided by said section was superseded by "a comprehensive and complete scheme • • • for the liquidation and distribution of their assets when insolvent • • •. In that statute we find preferences relative to the state which we think clearly show an intent on the part of the Legislature to waive any priority which otherwise might have been claimed by the state under the prior general statute (3152)."

II.

The general provisions contained in Section 3466, U. S. Revised Statutes (31 U. S. C. A. 191), and in the similar Section 3152, R. S. Mo. 1929, are superseded by the specific provisions dealing completely with one subject. Not only in bankruptcy matters, but in others in which legislatures have passed comprehensive statutes dealing completely with one subject, the general provisions contained in the priority statutes have been superseded by the specific provisions. This Court has held, in **Cook County National Bank v. United States**, 107 U. S. 445, 2 Sup. Ct. 561, 27

L. Ed. 537, that the specific provisions of the National Banking Law supersede the general provisions of section 3466. In that case the Treasury Department held bonds of an insolvent bank to secure its circulating notes, and after selling the bonds and applying the proceeds to redeem the notes, had on hand $30,000 to the bank's credit. The bank, however, owed the Government $20,000 for postal and money order funds deposited with it by the Post Office Department. In holding that the provisions of Section 3466, U. S. Revised Statutes, did not apply, the Court, in part, said (l. c. 539):

> "These provisions (dealing with the liquidation of insolvent national banks) must be deemed, therefore, to withdraw national banks, which have failed, from the claims of insolvent persons out of whose estates demands of the United States are to be paid in preference to the claims of other creditors. The law of 1797, reenacted in the Revised Statutes giving priority to the demands of the United States against insolvents, cannot be applied to demands against those institutions. The provisions of that law and of the National Banking Law, being, as applied to national banks, inconsistent and repugnant, the former law must yield to the latter, and is, to the extent of the repugnancy, superseded by it. The doctrine as to repugnant provisions of different laws is well settled and has often been stated in decisions of this Court. A law embracing the entire subject, dealing with it in all its phases, may thus withdraw the subject from the operation of the general law as effectually as though, as to such subject, the general law were in terms repealed. The question is one respecting the intention of the Legislature, and although as a general rule, the United States are not bound by the provisions of a law in which they are not expressly mentioned, yet, if a particular statute is clearly designed

> to prescribe the only rules which should govern the subject to which it relates, it will repeal any former one as to that subject (citing cases)."

The Supreme Court of Missouri followed this principle in the **Holland Banking case**, 313 Mo. 307, 287 S. W. 302. This case involved the construction of the State Depository Law, the Court holding that the general priority statute (section 3152) was superseded by the depository statute. The Court, in part, said:

> "We are satisfied that the decided trend of the better reasoned cases is to the effect that where a state has a general statute giving priority to the debt due the state, and where such state also has a depository law, * * * the state will be deemed to have waived its priority rights under the general priority statute."

This principle was again followed in the case of **State v. Farmers Exchange Bank**, 331 Mo. 689, 56 S. W. (2d) 129.

III.

The Bankruptcy Act takes into consideration the whole range of the indebtedness of a bankrupt and the order of payment to creditors. Congress has provided in the Bankruptcy Act a comprehensive law dealing completely with matters of bankruptcy. The act deals, in Section 67 (b), with liens, and in Section 64 (104 U. S. C. A.) with priorities, providing seven classes. Had Congress intended to give state tax claims priority over municipal tax claims it seems reasonable it would have so provided.

In **Guarantee Title and Trust Co. v. Title Guaranty and Surety Company**, 224 U. S. 152, 32 Sup. Ct. 457, 56 L. Ed.

76, a surety who was subrogated to the rights of the United States claimed that, by reason of Section 3466, U. S. Revised Statutes, its claim had priority over labor claims. In denying this contention, this Court, in part, said:

> "The Bankruptcy Act of 1867, as we have seen, provided for priority, first, for the payment of expenses, and, second, of 'all debts due to the United States and all taxes and assessments under the laws thereof.' The priority therefore given by the Bankruptcy Act was coextensive with the priority given by the statute of 1797. In other words, to repeat, there was a reaffirmation by the Bankruptcy Act of the statute of 1797, but there is not such affirmation by the Bankruptcy Act of 1898 of that statute, which still exists, as we have said, as Section 3466 of the Revised Statutes. There is a change of provisions, and we come to the question if there is a change of purpose * * *. A different order is prescribed by the Act of 1898 and something more. Labor cla are given priority, and it is provided that the de having priority shall be paid in full. The only exception is 'taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality.' These are civil obligations and not personal conventions, and preference was given to them, but as to debts, we must assume a change of purpose in the change of order, and we cannot say that it was inadvertent. **The act takes into consideration, we think, the whole range of indebtedness of a bankrupt—national, state and individual—and assigns the order of payment.** The policy which dictated it was beneficial and well might induce a postponement of the claims, even of the sovereign, in favor of those who necessarily depend upon their daily labor, and to give such claims priority could in no case seriously affect the sovereign."

In **Davis v. Pringle**, 268 U. S. 315, 45 Sup. Ct. 352, 69 L. Ed. 974, this Court held that the term "person" contained in paragraph 5 (now 7) of Section 64 (b) of the Bankruptcy Act did not include the United States. The Court, however, in leading up to the main question, said:

> "**It may be assumed that the priority must be found, if at all, in the Bankruptcy Act, and in its supposed incorporation of Revised Statute 3466.** That act, as was said in Guarantee Title & Trust Co. v. Title Guaranty & Surety Co., 224 U. S. 152, takes into consideration * * * the whole range of indebtedness of the bankrupt—national, state and individuals—and assigns the order of payment."

IV.

Under Section 64 of the Bankruptcy Act all taxes, whether due to the United States, state, county, district or municipality, are placed on an equal basis.

This Court, in the case of **New Jersey v. Anderson**, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284, said:

> "The requirement of the present law is a wide departure from the Act of 1867, and specifically obliges the trustee to pay all taxes legally due and owing, without distinction between the United States and the state, county, district or municipality."

Although the interpretation of section 64 was not necessary to a determination of the issues in that case, the dictum there established has been followed by the various federal courts of appeals.

In the case of **Reese v. U. S.**, 75 Fed. (2) 9, the Court said:

> "It may be true, as it is contended, that a general

judgment lien, not levied on specific property before the date of insolvency, cannot stand against the priority given the United States, where section 191 (3466) controls, but here the Bankruptcy Act controls, and it is held to have superseded the priority statute in cases of bankruptcy."

This principle is further established in the case of **In re Inland Dredging Corporation**, 61 Fed. (2d) 765, wherein the Court says:

"We do not of course mean that a state statute may control the distribution of bankrupt estates. The priority arises under section 64b (7), which incorporates the state law pro tanto; and the hierarchy of claims—the order of their priority—is fixed by that section. Hence we ignore the provision of section 130 that premiums shall be paid immediately after claims for wages. They take their place in the order prescribed by section 64b (7), regardless of where section 130 puts them."

In the case of **In re A. E. Fountain, Inc.**, 295 Fed. 873, the Referee had ordered "the tax of the United States and the State of New York to be prorated pari passu." In affirming this order the District Court said:

"The taxes under the foregoing provisions of the Bankruptcy Act are not directed to be paid in any precise order, although the United States is mentioned first. As the act carefully provides in subdivision b the order of payment of various items by placing them under separate numerals, it seems reasonable to contend that it would have done this in respect to taxes if Congress had intended any discrimination in priority between taxes due the United States and taxes due the states and **political subdivisions thereof.**"

The case of **In re A. J. Waterman Mfg. Co.**, 291 Fed. 589, involved the question of priority between a claim of the United States for taxes and a claim of the City of Portland for taxes. The Court said:

> "Subsection (a) of Section 64 of the Bankruptcy Act puts all taxes in one class, and in a class prior to all claims enumerated in section (b). I cannot sustain the contention of the United States that the United States has priority in the matter of taxes over the City of Portland. That section is distinct in putting all taxes upon an equality. For the reasons which I have given, I allow the claims for the administration of the estate to have priority over the taxes. I allow, also, the expenses of the common-law assignees in preserving the estate to have priority over the claims for taxes, they being found to be beneficial to the estate. After allowing priority to such claims—namely, for administration for the benefit of creditors and for the services and disbursements of the common-law assignees in preserving the estate—there will remain the sum of $4,468.30 to be divided between the tax claims. I have instructed the Special Master to divide this sum in proportion to the amounts of the claims of the United States, and of the City of Portland, with interest. He had made this division. The allowance for taxes appears in the schedule of amounts allowed, filed with this opinion."

The Court in **In re Wyley**, 202 Fed., l. c. 902, said:

> "Considering the dual nature of our Government, and that neither the Union nor the states may destroy or hinder the other in several functions, and all have an equal need of their revenues, it is concluded that the intent of Congress was that there should be a pro rata payment upon all the taxes claimed in section 64 (a) when the available fund is not sufficient

to pay, in full, the taxes due the United States, having no priority over the others * * *."

Prior to the time the New Jersey v. Anderson case, supra, was handed down, the Circuit Court of Appeals, in **City of Waco v. Bryan**, 127 Fed. 79, said:

> "The present bankruptcy law gives priority for all taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality in advance of the payment of dividends to creditors. In short, it puts taxes due the state, counties and municipalities upon the same footing as taxes due the United States."

The Court, in this case, even without the guidance of the dictum in the later New Jersey case, took the same view, that Congress intended to place the claims of the United States and the states, counties and municipalities upon an equal basis.

In re Slonka, 122 Fed. 630, holds that "no principle of statutory construction is better settled than that which displaces the application of general provisions to a particular subject when there are specific provisions applicable to it in the same act."

In **In the Matter of Lewis**, 99 Fed. 936, the Court says:

> "In other words, although the laws of a state giving priority to certain debts are by section 64b, class 5 (now 64b, class 7), introduced into the scheme of the present Bankruptcy Act, yet such state laws are so introduced only so far as the debts to which they give priority are not expressly dealt with as to priority in the Bankruptcy Act itself. Where both a state law and the Bankruptcy Act give priority to the same class of debts the Bankruptcy Act not only con-

trols the state law in the case of absolute conflict between the two, but by its express regulation of its priorities, excludes the state law altogether."

And, in the case of **In re Consumers Coffee Co.**, 18 A. B. R. 500, the Court said:

"Even if a lien, properly so called, exists under the Pennsylvania statute for rent in arrears at the time when the proceedings in bankruptcy were begun, the statute cannot override the act of Congress. While the priority of the landlord's claim is undoubtedly preserved in clause (b) (5) of section 64, this priority is not over all other claims whatever, but only over those that are not specified in the section as being even higher in right. The order of distributing the assets of a bankrupt having thus been expressly laid down by Congress, that order must be followed by the federal court * * *."

V.

The power of Congress to enact a complete bankruptcy law is not limited by the sovereignty of the states.

In **Board of Trade v. Johnson** (2/18/24), 264 U. S. 1, 44 Sup. Ct. 232, 68 L. Ed. 533, the Court had under consideration the question of whether the membership of a bankrupt in the Chicago Board of Trade was property which passed to the trustee in bankruptcy. The Supreme Court of Illinois had held, in Barclay v. Smith, 107 Ill. 349, that such membership was not property. The Court, speaking through Mr. Chief Justice Taft, in holding that the membership was property, in part, said:

"Congress derives its power to enact a bankrupt law from the Federal Constitution, and the construction of it is a federal question. Of course, where the

bankrupt law deals with property rights which are regulated by the state law the federal courts in bankruptcy will follow the state courts; but when the language of Congress indicates a policy requiring a broader construction of the statute than the state decision would give it, federal courts cannot be concluded by them (citing cases)."

VI.

The dictum announced by this Court in the case of New Jersey v. Anderson, supra, in 1906, has evoked no clarifying measures by Congress, and has been followed by inferior federal courts.

In 1925 this Court, in the case of Davis v. Pringle, supra, decided that the term "person" contained in what is now paragraph 7 of Section 64 (b) of the Bankruptcy Act, did not include the United States, and, in the following year, 1926, Congress amended the Bankruptcy Act by providing, in paragraph 7 of section 64 (b) thereof, that "the term 'person,' as used in this section, shall include corporations, the United States and the several states and territories of the United States." While Congress, within one year after the Pringle case, clarified its intention concerning the meaning of the term "person," it has not since 1906, when the New Jersey v. Anderson case was decided, indicated that the construction of Section 64 of the Bankruptcy Act by this Court varied from that of its intention.

It seems reasonable that, in amending the Bankruptcy Act in 1926, Congress would have amended the act further had it felt the construction of section 64 by this Court in the New Jersey case was not in accordance with the legislative intent.

The decisions of the inferior federal courts in construing statutes, while not binding on this Court, may be given

respectful consideration. In **Newman v. Lynchburg Investment Corporation**, 236 U. S. 692, 35 Sup. Ct. 477, 59 L. Ed. 792, this Court had under consideration the construction of a statute of the District of Columbia relating to publication in condemnation proceedings. This Court upheld the construction of the lower court, saying, in part:

> "The fact that the statute had been so construed in a great number of cases in the district, the list of which has been submitted to us, is important, not only as confirmation of our view, **but as a reason for taking it if we felt more doubt than we do.**"

CONCLUSION.

We believe that the above authorities overwhelmingly hold that the order of distributing the assets of a bankrupt has been expressly laid down by Congress; that the Bankruptcy Act supersedes Section 3152, R. S. Mo. 1929, and provides for the payment of the tax claims of the State of Missouri and the City of St. Louis upon a pro rata basis.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 3.—October Term, 1936.

State of Missouri, Creditor, Petitioner, *vs.* John T. Ross, Trustee, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[November 9, 1936.]

Mr. Justice Sutherland delivered the opinion of the Court.

The respondent Ross is a trustee in bankruptcy. The estate of the bankrupt was indebted to the State of Missouri for taxes in the sum of $8,366.38, with interest, and to the City of St. Louis for taxes in the sum of $8,972.30 and interest. The funds of the estate were insufficient to pay these taxes in full. The referee held that the claims of the state and city were of equal rank under § 64 of the Bankruptcy Act, and that the available funds should be prorated between the claims according to their respective amounts. He therefore denied the motion of the state for priority.

The order of the referee was approved and confirmed by the district court; and upon appeal to the circuit court of appeals, the order of the district court was affirmed. 80 F. (2d) 329.

The referee and both courts proceeded upon the theory that by § 64 b, ¶ 6, of the Bankruptcy Act, all taxes, whether of the United States, state, county, district or municipality, were placed on a parity. We agree with that view.

Section 64 a requires the payment of all taxes "legally due and owing by the bankrupt to the United States, State, county, district, or municipality, in the order of priority as set forth in paragraph (b) hereof." Paragraph (b) prescribes the order of priority in which debts shall be paid in advance of the payment of dividends to creditors, the sixth order being "taxes payable under paragraph (a) hereof", and the seventh order being "debts owing to any person who by the laws of the States or the United States is

entitled to priority." The text of paragraph (b) in full appears in the margin.[1]

First. By this enumeration it is clear that Congress intended to establish seven distinct classes of indebtedness and establish their priority in respect of one another in the order set forth. When it came to the sixth paragraph, it embodied taxes payable under paragraph (a), there enumerated as taxes due the United States, state, county, district or municipality. The intention clearly was to put these various governmental units in respect of their taxes in a single class upon terms of equality with one another. Since Congress was at pains to set forth the order of priority in distinct paragraphs under separate numerals, we are unable to reach any other conclusion. If it had been intended to establish priorities as among the governmental units named in the order in which they appear in the 6th paragraph, the very structure of § 64 b plainly suggests that each would have appeared under a separate numeral instead of all being grouped under a single numeral.

In *New Jersey* v. *Anderson,* 203 U. S. 483, 489, this court specifically said: "The requirement of the present law is a wide departure from the Act of 1867, and specifically obliges the trustee to pay all taxes legally due and owing, without distinction between the United States and the State, county, district, or municipality."

[1] *b* The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expense of such recovery; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary and involuntary cases, as the court may allow; (4) where the confirmation of composition terms has been refused or set aside upon the objection and through the efforts and at the expense of one or more creditors, in the discretion of the court, the reasonable expenses of such creditors in opposing such composition; (5) wages due to workmen, clerks, traveling or city salesmen, or servants, which have been earned within three months before the date of the commencement of the proceeding, not to exceed $600 to each claimant; (6) taxes payable under paragraph (a) hereof and (7) debts owing to any person who by the laws of the States or the United States is entitled to priority: *Provided,* That the term "person" as used in this section shall include corporations, the United States and the several States and Territories of the United States.

It is true that this statement was not necessary to the decision; but it nevertheless correctly states our view as to the meaning of the clause under consideration, and is now definitely approved. The decision in that case was made nearly thirty years ago, since which time the lower federal courts have almost unanimously followed the rule there stated. We deem it unnecessary to review the decisions, since that has been carefully done by the referee in his certificate, and by the court in its opinion. Among the cases are the following: *In re A. E. Fountain, Inc.*, 295 Fed. 873, 874; *In re Wyley Co.*, 292 Fed. 900, 902; *In re A. J. Waterman Mfg. Co.*, 291 Fed. 589, 594. These decisions are plainly correct; but if they were doubtful, we should at this late day hesitate to disturb them. *United States* v. *Ryan*, 284 U. S. 167, 174. Moreover, Congress in the face of these decisions has permitted the clause as it now appears in paragraph (6) to stand for many years without change in its phraseology, although amending that portion of the Bankruptcy Act in other particulars. This is persuasive evidence of the adoption by that body of the judicial construction. *United States* v. *Ryan, supra*, at p. 175; *Sessions* v. *Romadka*, 145 U. S. 29, 41-42.

Second. The state urges that the question is controlled by paragraph (7), which gives priority in the seventh degree to "debts owing to any person who by the laws of the States . . . is entitled to priority." Sec. 3152, Rev. Stat. Missouri, 1929, provides that in cases of insolvency, debts due the state shall be first satisfied, and that this priority shall extend to cases in which an act of bankruptcy is committed. The contention is that unpaid taxes constitute debts, and therefore fall within the seventh paragraph. But this conclusion must be rejected; for conceding that taxes are debts, they are carved out of the general provisions of paragraph (7) and put in a special class under paragraph (6), and thus fall within the rule that special provisions prevail over general ones which, in the absence of the special provisions, would control. *Townsend* v. *Little*, 109 U. S. 504, 512; *McKee* v. *United States*, 164 U. S. 287, 294; *Kepner* v. *United States*, 195 U. S. 100, 125; *In re Rouse, Hazard & Co.*, 91 Fed. 96, 101; *In re Slomka*, 122 Fed 630, 631.

Decree affirmed.